IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 428.

PENNSYLVANIA WATER & POWER COMPANY and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND,

Petitioners,

v.

FEDERAL POWER COMMISSION, and CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND, Intervenors,

Respondents.

BRIEF FOR THE PETITIONERS.

WILKIE BUSHBY,
Messrs. ROOT, BALLANTINE, HARLAN, BUSHBY & PALMER,
31 Nassau Street,
New York 5, N. Y.

RANDALL J. LEBOEUF, JR.,
Messrs. LEBOEUF & LAMB,
15 Broad Street,
New York 5, N. Y.

JAMES PIPER,
Messrs. PIPER & MARBURY,
1000 Maryland Trust Building,
Baltimore 2, Md.

RAYMOND SPARKS,
Messrs. AWALT, CLARK & SPARKS,
822 Connecticut Avenue,
Washington 6, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 428.

PENNSYLVANIA WATER & POWER COMPANY and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND,
Petitioners,

v.

FEDERAL POWER COMMISSION, and CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND, Intervenors,
Respondents.

ERRATA SHEET

FOR BRIEF FOR THE PETITIONERS.

Page 10

The record reference at line 14 should be (R., Vol. 16, pp. 4959, 4980), the figure $616,000 being the difference between the alleged excess revenues received by Penn Water from Consolidated as found by the FPC, $1,733,318 (R., Vol. 16, p. 4980) and the adjusted revenue received from Consolidated as found by the FPC, $1,116,835 (R., Vol. 16, p. 4959).

INDEX.

* The Federal Power Act.

Table of Citations.

Cases.

PAGE

PAGE

CONSTITUTIONAL PROVISIONS.

STATUTES.

---

* The pertinent Pennsylvania statutes are printed in full as Appendix A to the brief for the Pennsylvania Public Utility Commission in No. 429.

Miscellaneous.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 428

PENNSYLVANIA WATER & POWER COMPANY and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND,
Petitioners,

v.

FEDERAL POWER COMMISSION, and CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND, Intervenors,
Respondents.

BRIEF FOR THE PETITIONERS.

Preliminary Statement.

This cause is before this Court on a writ of certiorari to review the judgment and orders of the United States Court of Appeals for the District of Columbia Circuit (D. C. Circuit), entered by a divided Court July 3 and 6, and September 6, 1951 (Printed Record (R.), Vol. 18, pp. 5394, 5395, 5399).

The judgment and orders denied motions to set aside, and instead affirmed, orders of the Federal Power Commission (FPC) issued under the Federal Power Act (the Act*) directing continuance of or premised on provisions of two power contracts (Baltimore and Safe Harbor contracts) which have been adjudged illegal in two

---

* For references to U. S. C. citations of sections, see table of citations.

unanimous decisions of the United States Court of Appeals for the Fourth Circuit (R., Vol. 18, p. 5322 and Opinion in Case No. 6315, January 3, 1952*) as violative of the Federal antitrust laws, Pennsylvania statutes, common law and public policy, the Fourth Circuit having held that the FPC had no authority to validate the contracts by the orders here involved.**

Opinions Below.

The majority opinion (R., Vol. 18, p. 5367) of the D. C. Circuit, per Bazelon, J., in which Fahy, J., joined (D. C. majority), and the dissenting opinion (R., Vol. 18, p. 5402) of Wilbur K. Miller, J., are reported at 193 F. 2d 230. The opinions and orders of the FPC of January 5, 1949, February 28, 1949, March 17, 1949, October 27, 1949 and December 15, 1949, which were affirmed by the D. C. majority, are found at R., Vol. 16, pp. 4845, 5178, 5220 and Vol. 17, pp. 5267, 5315.

Jurisdiction.

The petition for a writ of certiorari was granted February 4, 1952 (R., Vol. 18, p. 5419).*** The jurisdiction of this Court rests on Section 1254(1) of the Judicial Code

---

* Pamphlet opinion furnished Court on petition for certiorari (Pamphlet op.).

** *Pennsylvania Water & Power Co., Pennsylvania Public Utility Commission* v. *Consolidated Gas Electric Light & Power Company of Baltimore, Public Service Commission of Maryland*, 184 F. 2d 552 (1950), cert. den. 340 U. S. 906 (1950), relating to the Baltimore contract; *Pennsylvania Water & Power Co., Pennsylvania Public Utility Commission* v. *Consolidated Gas Electric Light & Power Co., Safe Harbor Water Power Corporation, Public Service Commission of Maryland*, No. 6315, January 3, 1952, affirming District Court for Maryland, 97 F. Supp. 952 (May 3, 1951) and Docket No. 5253 (Op. March 12, 1951 and Order March 19, 1951), relating to the companion Safe Harbor contract.

*** Certification to the FPC of the opinion and judgment (in lieu of mandate) of the D. C. Circuit has been stayed (Transcript of Record (Tr.) 5750) and the stay was extended and is still in effect pending final decision of this Court. The FPC orders are expressed

(62 Stat. 928, 28 U. S. C. §1254(1) and Section 313(b) of the Act (49 Stat. 860, 16 U. S. C. §825(l)).*

Issues Presented.**

The primary issue in this case is whether the FPC (in the absence of any express authority in the Act such as is found in certain other Federal regulatory statutes) may compel electric utilities to perform, and may base its rate orders upon continued performance of, contracts which have been adjudged by the courts to be *per se* illegal and therefore void in their entirety as violative of the Federal antitrust laws, the laws of the utilities' state of incorporation and public policy.

This issue will be dealt with under Point I, relating to the Federal antitrust laws (the antitrust laws), and under Point II, relating to state law and public policy.

There is a further issue, discussed in Point III, whether a licensee subject to regulation under Part I of the Act, is also subject to the different regulatory system of Part II

---

to be operative from and after February 1, 1949, but their effect was stayed by order of the FPC, and by order of the D. C. Circuit, and revenues collected by Penn Water from its four electric utility customers in excess of the amounts allowed by the FPC orders have been segregated to await the final determination of the case.

---

* This Court also granted certiorari to review the judgment and orders of the D. C. Circuit on a petition filed by the Pennsylvania Public Utility Commission (No. 429). Both cases have been set down for hearing on the same date during the week of March 31, 1952.

** While there was a voluminous record below, the basic issue here is a simple one as Judge Miller said (R., Vol. 18, p. 5403). All that is needed are the power contracts (R., Vol. 15, pp. 4554-4603, 4606-21), opinions of the Fourth Circuit (R., Vol. 18, pp. 5322, 5356 and Pamphlet Op.), judgments entered on such opinions (R., Vol. 18, pp. 5396, 5398), opinions of the D. C. Circuit (R., Vol. 18, pp. 5367, 5402), and portions of the opinions and orders of the FPC (R., Vol. 16, pp. 4845-65, 4952-97, 5178-94; Vol. 17, pp. 5267-92). Petitioners were, however, unable to obtain from respondents' counsel a stipulation thus limiting the printed record.

of the Act. The asserted applicability of Part II was in turn basic to the D. C. majority's holding that the antitrust laws were repealed by implication by Part II and, particularly, that Section 10(h)* of Part I, reaffirming the antitrust laws, was so repealed.

Statement.

The two power contracts which are the basis of the FPC orders under review, and which were adjudged illegal by the Fourth Circuit are: (1) The Baltimore contract between Pennsylvania Water & Power Company (Penn Water) as, seller and Intervenor, Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated) as buyer; and (2) The Safe Harbor contract between Safe Harbor Water Power Corporation (Safe Harbor), as seller, and Penn Water and Consolidated as buyers.** They were termed by the FPC the "foundation contracts" of its orders (R., Vol. 16, p. 4859). The FPC orders on review directed continuance of illegal contractual arrangements contained in the Baltimore contract, and substantive provisions of such orders were based on the assumed continuance of both contracts.

---

* Section 10(h) of Part I was reenacted in 1935 when Part II of the Act was first enacted. It reads as follows:

"Section 10. All licenses issued under this Part shall be on the following conditions: * * *

"(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

** The Baltimore contract consisted of three agreements dated December 31, 1927, June 1, 1931 and September 29, 1939 (R., Vol. 15, pp. 4577-4603, 4606-21). The Safe Harbor contract consisted of three agreements dated June 1, 1931, August 1, 1932 and November 22, 1939 (R., Vol. 15, pp. 4554-76). In the case of each contract the basic agreement was the one dated June 1, 1931.

The Corporations Involved in the Illegal Contracts.

Penn Water is a Pennsylvania electric utility corporation owning a hydroelectric generating plant at Holtwood, Pennsylvania, on the Susquehanna River. Penn Water also owns a steam electric generating plant and transmission lines in Pennsylvania and, through Susquehanna Transmission Company of Maryland (Transmission Company)*, transmission lines in Maryland. The present business of such companies is the generation and sale and transmission of electric energy at wholesale and in bulk. Penn Water also purchases electric energy for resale. Penn Water, directly and through Transmission Company, has charter rights for the sale of electric energy to the public at retail in Pennsylvania and Maryland. Although it has at the present time no retail distribution system, Penn Water has one large retail customer, the Pennsylvania Railroad.** Penn Water is a licensee under Part I of the Act.

Safe Harbor is a Pennsylvania electric utility corporation owning a hydroelectric generating plant at Safe Harbor, Pennsylvania, on the Susquehanna River, about eight miles above the Penn Water hydroelectric plant at Holtwood. It has no transmission lines or retail distribution system. Its business is the sale of electric energy at wholesale and in bulk. Safe Harbor is a licensee under Part I of the Act.***

---

* References to Penn Water will include Susquehanna Transmission Company of Maryland, its wholly-owned subsidiary, except where inappropriate.

** The Railroad is supplied under a contract made jointly with Safe Harbor, Consolidated and Potomac Electric Power Co., but the FPC did not assert jurisdiction over this contract, the energy sold thereunder not being for resale.

Penn Water also sold electricity at retail to the street railway system in Baltimore until Consolidated took the business (R., Vol. 18, p. 5325).

*** The voting stock of Safe Harbor is owned one-half by Penn Water and one-half by Consolidated. Consolidated also owns an equal number of shares of non-voting stock.

Consolidated, one of the large utility companies in the United States, is a Maryland electric utility corporation with steam electric generating, transmission and distribution facilities in and around Baltimore, Maryland. Consolidated has generating capacity several times that of Penn Water or Safe Harbor and is in the business of selling electric energy at wholesale and in bulk as well as at retail and of purchasing energy for resale. Consolidated is also in the business of manufacturing and distributing gas and has a steam heating business. Consolidated's financial ~~structure~~ ($313,000,000 gross assets) is many times the size of that of Penn Water ($63,000,000 gross assets).

The plants of Penn Water and Safe Harbor are physically connected through the transmission lines of Penn Water. These plants are also physically connected through those lines (a) in Pennsylvania, with neighboring utilities Pennsylvania Power & Light Company (PP&L) near Lancaster, Philadelphia Electric Company (PE) in Coatesville, and Metropolitan Edison Company (ME) in York, and (b) in Maryland, with Consolidated near Baltimore and with Potomac Electric Power Company (PEPCO), which serves Washington, D. C. Like Consolidated, each of these four other utilities has substantial generating capacity, as well as transmission lines and retail distribution facilities.*

Except for the illegal contracts, power generated by Penn Water, Safe Harbor and Consolidated would be in competition or potential competition everywhere in the region, as held by the Fourth Circuit. The Fourth Circuit said:

* The locations of the generating plants and transmission lines of these companies and other companies in the region are shown on the map attached to the back cover of this brief.

"If it were not for the agreement between the parties which is the subject of this suit, the parties would be potential competitors in the generation and sale of electric energy through their present facilities or other facilities that might be constructed; and would also be potential competitors in the purchase of power from others for resale. The power required by Potomac Electric to supply the wants of consumers in the District of Columbia could be purchased by Potomac Electric either from Consolidated or Penn Water and could be supplied by their present facilities or additional facilities that might be built, or by purchases from others. Similarly, Penn Water and Consolidated would be potential competitors for the supply of electric energy in and around Baltimore at wholesale or retail to customers with their present lines or an extension thereof to be approved by the public authorities.

"The electric power which is now distributed in and near Coatesville, Pennsylvania, by Philadelphia Electric could be supplied from the facilities now owned or additional facilities to be built by Penn Water or could be supplied from the facilities of Consolidated.

"Similarly, Penn Water and Consolidated would be potential competitors with respect to energy taken from Penn Water by Metropolitan Edison and Pennsylvania Fuel [Power] & Light which is used in York and Lancaster areas.

"Penn Water and Consolidated would be potential competitors for the sale of power to Potomac Edison at Frederick, Maryland, whose lines at that point are only a short distance from the lines of Penn Water so that they could easily be connected" (R., Vol. 18, pp. 5326-7).

The Fourth Circuit made a similar statement regarding Safe Harbor (Pamphlet Op., p. 8).

The Fourth Circuit Decisions Adjudging the Baltimore and Safe Harbor Contracts Illegal *Per Se.*

Since the illegality of the Baltimore and Safe Harbor contracts has been established in other proceedings in the Fourth Circuit (and the question here is the authority of the FPC to perpetuate illegal arrangements or base its rate orders thereon), it is not necessary to discuss the illegalities in detail. It will suffice to summarize the Fourth Circuit decisions.

The Fourth Circuit (Parker, Soper and Dobie, JJ.) unanimously held the Baltimore and the Safe Harbor contracts to be illegal on their face and void in their entirety, as in violation of the Federal antitrust laws, the statutes of Pennsylvania, common law and public policy.

The Fourth Circuit held that the contracts surrendered control of Penn Water and Safe Harbor to Consolidated, stifled their initiative with respect to rates, services, operating economies and new business and destroyed their independent corporate character as Pennsylvania corporations. By giving control to Consolidated over their contracts, sales, purchases, prices, territories, markets, output and expansion, the contracts made Penn Water a "virtual vassal of Consolidated" (R., Vol. 18, p. 5408) and Safe Harbor an "impotent agency" (R., Vol. 18, p. 5362). Not only did the contracts by their express terms confer these restrictive control powers on Consolidated, but the very method of payment provided for effectively prevented competition by stifling all incentive of Penn Water and Safe Harbor to compete.*

---

* The Safe Harbor contract was substantially similar to the Baltimore contract, except that Safe Harbor's power not sold to others under contracts approved by Consolidated was to be sold two-thirds to Consolidated and one-third to Penn Water (instead of all to Consolidated) and Consolidated and Penn Water divided

Under the contracts Penn Water and Safe Harbor (sellers) were to be paid for power, not on the customary basis of a rate specified in advance per unit of capacity and energy actually furnished, but, regardless of the amount of power delivered, on the unusual basis of annual payments equal to all of the sellers' operating expenses, including taxes, and a specified percentage return on plant investment, with a credit for revenues received by the sellers from sales of power to others made with Consolidated's approval, and (in the case of Penn Water) with a charge for amounts paid by Penn Water for power purchased by it under contracts made with Consolidated's approval.

Such an arrangement is not in effect in the various power pools around the country and is virtually unheard of in the power industry, except in the case of a parent and a wholly-owned subsidiary where the subsidiary is merely an incorporated "vest pocket" of the parent.

The payment provisions of the Baltimore and Safe Harbor contracts do not provide for rates in the ordinary sense at all. They merely set up a series of debits and credits designed to bring the sellers out at a specified overall rate of return on plant investment unrelated to actual operations or deliveries of power. The amount of charges either in total dollars or per unit of supply cannot even be

---

the residual payments to be made to Safe Harbor therefor on a two-thirds-one-third basis (instead of the entire residual payment being made by Consolidated). As counsel for Consolidated stated in the District Court in the Baltimore contract case (Ct. Tr., p. 422, Oct. 5, 1949) "the contract is substantially the same * * *. It is almost identical language." However, Consolidated refused to concede the illegality of the Safe Harbor contract following the Fourth Circuit decision on the Baltimore contract and this Court's denial of certiorari, and Penn Water therefore brought a declaratory judgment action in respect of the Safe Harbor contract similar to its action in respect of the Baltimore contract.

computed except retroactively, on an annual basis, long after the rendering of the service. This is not the accepted concept of fixed and definite rates and charges, such as, for example, public utilities under Section 205(c) of the Act are required to keep on file, for public inspection, with respect to every sale of electricity.*

This arrangement can even work out so that for a given year Consolidated will not only not pay Penn Water for a large amount of power received from it but will actually have a credit at the expense of the other customers. If the orders had been in effect for 1946, on the basis of the FPC test figures for that year, instead of Consolidated paying Penn Water for power, Penn Water would have had to pay Consolidated $616,000 (R., Vol. 16, pp. 4958, 4979). This is obviously an improper preference to Consolidated and discrimination against customers paying on a unit rate basis such as the three Pennsylvania utilities.**

Penn Water's contracts with its three other electric utility customers, (PP&L, PE and ME) are power contracts of the usual type, specifying in advance rates per unit of capacity and energy actually delivered. These contracts

---

* Where charges for services are on a unit-rate basis any customer, by inspection of the tariffs, can see what any other customer is paying per unit of power and make comparisons with its own payments. In the case of Penn Water, none of its customers can ever know at any given time what Consolidated is paying for its service from Penn Water. Furthermore, the price per unit of supply can change substantially either up or down without any necessity for filing new schedules or obtaining commission approval as is normally necessary before any change can be made in unit rates. Payments are even adjusted years later by reason of such items as tax refunds or extra assessments.

** The specified return method of payment adopted in the FPC order of October 27, 1949 (R., Vol. 17, pp. 5279-83) should be contrasted with the usual unit rates in the schedules provided in the order with respect to services to the three Pennsylvania customers (R., Vol. 17, pp. 5284-92).

are also normal in that they do not have managerial controls by one company over the other.*

In its decisions on the Baltimore and Safe Harbor contracts, the Fourth Circuit mentioned particularly the following among the *per se* violations of the Sherman and Clayton Acts: (a) The prevention of competition between Penn Water, Safe Harbor and Consolidated, (b) the restraints on sales of power by Penn Water and Safe Harbor, (c) the restraints on installations of new facilities by Penn Water and Safe Harbor and (d) the restraints on purchases of power by Penn Water.**

The Fourth Circuit also held that the restraints in the contracts deprived Penn Water and Safe Harbor of the initiative each was required to exercise in respect of services and rates under the Pennsylvania statutes, and that the crippling effect of the contract on each company and its Board of Directors, even in the absence of the statutes, was violative of common law and public policy as laid down in decisions of this Court.*** In other words, the Fourth

---

* These three contracts were entered into with the approval of Consolidated under the Baltimore contract, and Safe Harbor executed the contracts with PP&L and PE jointly with Penn Water, with the approval of Consolidated. The FPC orders also dealt with the rates in these three contracts.

** The Fourth Circuit, in the Baltimore contract case, also listed among the restrictive provisions the provision for an Operating Committee, giving Consolidated a veto over managerial decisions of Penn Water, and the arbitration article (R., Vol. 18, pp. 5328-9). The Fourth Circuit, in the Safe Harbor contract case, specifically enumerated among the restrictive provisions of the Safe Harbor contract (Pamphlet Op., p. 7) the payment provision, which was in all pertinent respects like the specified return method of payment provision in the Baltimore contract, and the provision for an Operating Committee giving Consolidated a veto over managerial decisions of Safe Harbor.

*** One of the cases cited by the Fourth Circuit to support the proposition was *Gibbs* v. *Consolidated Gas Company of Baltimore*, 130 U. S. 396 (1889), where this Court had condemned similar contractual arrangements attempted by Consolidated (or a predeces-

Circuit held the contractual arrangements to be violative of the fundamental organic law of Penn Water's and Safe Harbor's state of incorporation, common law and public policy, and not mere violations of some regulation imposed by Pennsylvania or its Public Utility Commission.*

The Fourth Circuit in the Baltimore contract case also decided an issue as to the FPC's authority, injected into the case by Consolidated for the first time on appeal, holding that the approval of the contract by the FPC orders here under review did not validate the contract, that the FPC had no authority to exempt the contract from the antitrust laws or oust the courts from jurisdiction to enforce those laws, and that the antitrust laws had not been impliedly repealed by the Act, but that Section 10(h) of Part I reaffirmed the antitrust laws.

The Fourth Circuit concluded that some new arrangement would be necessary, saying

> "It may well be, although the present arrangement between the Maryland and Pennsylvania utilities is invalid for the reasons set forth, that an interconnection of facilities and an interchange of electrical energy between them may be continued by some method that would meet with the approval of the appropriate regulatory authority and will not offend either the anti-trust laws or the utility laws of Pennsylvania" (R., Vol. 18, p. 5349).

sor) in the gas field as violative of common law and public policy. In its brief in the Baltimore contract case Consolidated conceded that that contract was "vicious" and was unable to distinguish its essence from the present Baltimore contract.

* Having decided that the Baltimore contract was illegal on the grounds mentioned, the Court in the Baltimore contract case expressly stated it was not passing on further questions of illegality such as *ultra vires*, although it later did so in the Safe Harbor contract case, where it held the contract *ultra vires*, by adopting the District Court decree (R., Vol. 18, p. 5398) to that effect in *haec verba* in its mandate.

In their petitions for certiorari in the Baltimore contract case, Consolidated and the Maryland Public Service Commission stressed the contention that the FPC had authority under the Act to validate the contract and had done so. This Court denied certiorari, 340 U. S. 906 (December, 1950).*

The decision of the Fourth Circuit on the Safe Harbor contract was simply a sequel to its previous decision on the Baltimore contract and followed it, finding that the effects of the Safe Harbor contract were essentially similar to those of the Baltimore contract. This was the only new issue in the Safe Harbor contract case. The Fourth Circuit reiterated its holding that the FPC had no authority to override the antitrust laws and state law and validate the contract and quoted with approval the dissenting opinion of the D. C. Circuit (Pamphlet Op. pp. 18-19). Both Fourth Circuit decisions follow established lines of decisions handed down by this Court.**

The Baltimore and Safe Harbor contracts were made for a term of 50 years at a time (June 1, 1931) when Penn

---

* The Maryland Commission intervened in the District Court and Court of Appeals in both contract cases, asking that the contracts be upheld. The Pennsylvania Commission also intervened in both cases, asserting that the contracts violated the laws of Pennsylvania and public policy. Counsel for the FPC were present in the District Court and Court of Appeals in both these cases, and were furnished at their request with all the Penn Water briefs in those cases. They sought to intervene by formal petition at the last minute in the Court of Appeals in the second case to urge the claim that the FPC has authority to validate the contract. The FPC was denied intervention because the application was not timely (Pamphlet op. p. 3), but the FPC was allowed to file a 55-page brief and to take part in the argument.

** Consolidated and the Maryland Commission filed petitions for certiorari in the Safe Harbor contract case, February 23, 1952. There is no more reason for granting these petitions than there was in the Baltimore contract case, which was simply reaffirmed by the Safe Harbor contract decision. The newly filed certiorari petitions will, therefore, be opposed.

Water, Safe Harbor and Consolidated were under the common control of J. E. Aldred and associates, which control began in 1910 and extended at least through 1946 (R., Vol. 18, p. 5329). The contracts were left-overs of the era of private banking house and holding company control of utilities. At the present time, however, there is no common control of Penn Water and Consolidated, and Penn Water has over 6,000 stockholders.

As the Fourth Circuit said with respect to the contracts:

> "These restrictions which tied the parties together and stifled individual initiative for the period of 50 years were made to promote the advantage of the persons in control and not primarily in the interest of the public." (Pamphlet Op., p. 15).

The oppressive contract powers had actually been used by Consolidated (R., Vol. 18, pp. 5330, 5334-5). Consolidated had required Penn Water to purchase power from it. Consolidated had interfered with Penn Water's contracts with the Pennsylvania customers. Consolidated had forbidden Penn Water in 1947 to expand its transmission system in Pennsylvania to meet the needs of the Pennsylvania customers. By December 1948 Consolidated had withheld over $900,000 of payments due to Penn Water. In November 1948 Consolidated prohibited Penn Water from building a large new steam electric generating plant at Holtwood.* This new plant could have produced economical power beginning in this year of heavy power demand by using coal deposited in the Susquehanna River (free but for the cost of dredging and processing) which would otherwise go to waste. Instead Consolidated insisted not only on preventing this source of competition from Penn Water but also on building a new steam plant of its own in

* At a cost, including attendant facilities, of about $20,000,000.

Baltimore, to be fueled with the more expensive bituminous coal bought in the market (R., Vol. 18, p. 5330).

It was this refusal of Consolidated under the Baltimore contract to permit Penn Water to proceed with a new steam plant, and this withholding of over $900,000, that caused Penn Water to begin the contract litigation on December 21, 1948.*

The Proceedings Before the FPC and the D. C. Circuit.

In September, 1944 the FPC by order initiated a proceeding to examine into Penn Water's rates. No hearings were begun until 1946. Hearings were completed in July, 1947. The first FPC order was issued eighteen months later (January 5, 1949). Consolidated, the Maryland Commission and the Pennsylvania Commission intervened in the proceeding.

The FPC assumed jurisdiction over not only Penn Water's rates to Consolidated but also over the rates for Penn Water's services in Pennsylvania to PP&L, PE and ME.

The FPC (1) directed continuance of illegal contractual arrangements including Consolidated's restraints and vetoes over managerial decisions and the illegal method of payment; and (2) based substantive provisions of its orders upon the assumed existence and continuance of the illegal contracts (a) by computing the amount of the total reduction in Penn Water's revenues so as to lower Penn Water's return to the abnormally low rate of 5¼% per annum (and then by a subsequent order to 4¾%) of

* Almost immediately Consolidated applied for and obtained from the District Court for Maryland (Coleman, J.) a preliminary injunction requiring Penn Water to perform the Baltimore and Safe Harbor contracts. The injunction remained in force until dissolved pursuant to order of the Fourth Circuit, January 17, 1951, after this Court had denied certiorari.

depreciated original cost upon the express basis of the "guaranteed fixed return" supposedly assured by the illegal long-term Baltimore contract, (b) by basing its jurisdiction over rates for Penn Water's services in Pennsylvania to the three Pennsylvania customers upon the existence of an alleged single interstate system (the facilities of Consolidated, Penn Water and Safe Harbor) created by the two illegal contracts, and upon interstate purchases of power by Penn Water from Consolidated required by an exclusive dealing provision in the Baltimore contract adjudged illegal *per se* under Section 3 of the Clayton Act, and (c) by basing the allocation of the reduction predominantly to Consolidated, as against the three Pennsylvania customers of Penn Water, on the assumed "entitlements" and "obligations" created solely by the two illegal contracts.

The FPC in its orders assumed jurisdiction over the rates of Penn Water under Part II of the Act as well as under Part I* and applied the regulatory system of Part II to Penn Water. As a result, Penn Water, a licensee under Part I, is in the impossible situation of being subjected to two conflicting regulatory systems.

The first FPC order was not issued until January 5, 1949, shortly after the contract litigation had been begun. The illegalities of the contracts, as raised by the contract litigation, were immediately brought to the attention of the FPC in a petition for rehearing, January 28, 1949. But the FPC denied rehearing, February 28, 1949, and held that, even if the Courts determined the contracts to be illegal, such illegalities would be immaterial to its orders (R., Vol. 16, p. 5184).

* Jurisdiction under Part I was asserted on the basis of the alleged inability of the Maryland Commission to agree with the Pennsylvania Commission.

Again the FPC reiterated this position when, on October 27, 1949, it entered an order, without notice or hearing, and, although exclusive jurisdiction of the proceeding had vested in the D. C. Circuit pursuant to Section 313(b) of the Act (the transcript of the record having been previously filed with the D. C. Circuit). By that order the FPC rejected rate schedules filed by Penn Water pursuant to the first FPC order, and prescribed new rate schedules, again based on and including the illegal contractual provisions, making substantive changes in its previous orders, including a further reduction of Penn Water's rate of return from 5¼% to 4¾%, and the addition of fuel rate adjustments in the Pennsylvania customer contracts.*

The petitions to the D. C. Circuit to review the FPC orders brought to the attention of that Court the illegalities of the Baltimore and Safe Harbor contracts, raised in the contract litigation, as grounds for setting aside the orders (R., Vol. 16, pp. 4807, 4813-14; R., Vol. 17, pp. 5222, 5230).

Prior to the completion of the filing of briefs in the D. C. Circuit in the present case, and after the Fourth Circuit decision invalidating the Baltimore contract, Penn Water moved (November 21, 1950) in the D. C. Circuit for leave to present that decision to the D. C. Circuit as a basis for setting aside the FPC orders on the ground that they were founded on the illegal Baltimore contract. When this Court denied certiorari in the Baltimore contract case, leave was granted by the D. C. Circuit and the matter was briefed and argued. While the decision was pending below, and immediately following the decision of the District Court for Maryland invalidating the Safe Harbor contract, Penn

* The position was reiterated when the FPC, by order of December 15, 1949, (R., Vol. 17, p. 5315) denied Penn Water's third petition for rehearing in which the contract illegality was again formally brought to the attention of the Commission.

Water moved (May 8, 1951) in the D. C. Circuit for leave to argue that the FPC orders should be set aside on the further ground that they were founded also on the illegal Safe Harbor contract.

The motions to set aside the FPC orders were denied by the D. C. majority which affirmed the FPC orders in all respects.

Penn Water's objectives in the cases in the Fourth Circuit were (1) to be free to compete with Consolidated, particularly as regards sales and purchases at wholesale, without the illegal restrictive controls by Consolidated and illegal pooling of revenues provided for in the contracts, and (2) to have its policies, contracts and expansion, and the exercise of initiative with respect to its rates, services, operating economies and new business, controlled by its Board of Directors as required by the laws of its state of incorporation.*

The FPC admitted that control by Consolidated over Penn Water is perpetuated by the FPC rate orders when it said in its brief below (Tr. 5574) that the arrangement prescribed by the FPC rate orders "permits Penn Water's facilities to be operated as though they were under common ownership with Baltimore Company's facilities."

Obviously this is a situation which the antitrust laws and the regulatory acts enacted in the 1930's were designed to prevent, *i.e.*, the exercise of controls and stifling of com-

---

* Contrary to assertions which have been made in these cases by Penn Water's opponents, the record is clear, as the Fourth Circuit said in a passage quoted in the D. C. dissenting opinion (R., Vol. 18, p. 5410), that Penn Water is not trying to stop electric service to Consolidated and thereby to withdraw from interstate commerce and thus escape from whatever regulatory system Congress has imposed on such interstate electric business.

petition by a large utility corporation such as Consolidated. The Federal Power Act itself is one of those acts, and is a reaffirmation of such principles, witness Section 10(h). This section was reenacted in 1935 as a portion of Part I of the Act, the whole of which (Parts I, II and III) was enacted as Title II of the Public Utility Act of 1935.

As the dissenting opinion points out (R., Vol. 18, pp. 5411-12, 5403) after the decision in the Fourth Circuit, the FPC "should have called the parties in and required them to work out immediately a new contract in conventional form which would accord with the opinions of the Court of Appeals for the Fourth Circuit," and "the Commission's orders stood in a vacuum after the Fourth Circuit held the contract invalid; the only service to which they can have application may not be lawfully continued."

The Baltimore and Safe Harbor contracts were properly stricken down by the Court. They should not in any respect be maintained through the guise of FPC rate orders.

Errors To Be Urged.

The D. C. Circuit erred in:

(1) Holding that the FPC had authority to direct continuance of contractual arrangements adjudged illegal under the antitrust laws and base critical features in its orders thereon.

(2) Holding that the FPC had authority to order continuance of contractual arrangements adjudged illegal under fundamental state laws and base critical features in its orders thereon.

(3) Holding that a licensee subject to the regulatory system of Part I of the Federal Power Act is also subject to the different regulatory system of Part II thereof.

(4) Holding that, regardless of whether Part II is generally applicable to licensees under Part I, the enactment of Part II repealed by implication portions of Part I, such as Section 10(h) and the provisions giving licensees a net investment rate base.

(5) Denying motions to set aside, but instead affirming, the orders of the FPC, including orders of October 27, 1949 and December 15, 1949, which were issued (a) after the D. C. Circuit had exclusive jurisdiction of the case under Section 313(b) of the Act, and (b) without notice and without opportunity for hearing in violation of the Fifth Amendment of the Constitution of the United States.

Summary of Argument.

I. The FPC has no authority to direct continuance of or base its orders on contractual arrangements adjudged illegal *per se* under the Federal antitrust laws.

The holding of the D. C. majority that the Federal Power Act repealed *by implication* the antitrust laws (which are specifically reaffirmed by Section 10(h) of the Federal Power Act itself), and empowered the FPC to require continuance of, and base important features in its orders on, contractual arrangements specifically adjudged illegal *per se* and void under the antitrust laws, is contrary to the decisions of this Court in *U. S.* v. *Borden Co.*, 308 U. S. 188 (1939), *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945), *U. S. Alkali Export Assn.* v. *U. S.*, 325 U. S. 196 (1945) and many other cases.

Congress has followed a clear and consistent pattern in regulatory legislation, of expressly specifying and narrowly confining any power intended to be conferred on a regulatory body to override the antitrust laws. Limited power of this character as to specified types of transac-

tions has been given to certain agencies but not to others. The only type of transaction as to which the FPC has been given such power is that given by the December 1950 amendment to Section 7 of the Clayton Act in connection with acquisitions of stock or assets.

This Court has repeatedly held that there is no implied repeal of, or exemption from, the antitrust laws and that even express statutory authorization to regulatory bodies to grant such exemption must be strictly construed and limited to the precise transactions specified in the authorization. Other Federal regulatory agencies (contrary to the FPC), and the Attorney General have recognized and carefully observed this basic principle.

The D. C. majority, however, held the antitrust laws and Section 10(h) of Part I of the Federal Power Act impliedly repealed by mere general regulatory provisions of Part II of the Act. The FPC clearly can, and is required, to administer these regulatory provisions without approving, as it did here, contractual arrangements which stand adjudicated as illegal under the antitrust laws. Under the system of unit-rates for capacity and energy, universally recognized as to electric utilities, it is neither necessary nor appropriate to allow one independent company to exercise managerial control over another or to stifle its initiative and incentive by illegal revenue pooling and other restrictive controls. See *U. S.* v. *Paramount*, 334 U. S. 131 (1948); *U. S.* v. *Reading Co.*, 253 U. S. 26 (1920); *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), and other Supreme Court and Courts of Appeals cases. The illegal contractual arrangements are basic to every important feature of the FPC rate orders here involved, including their provisions as to jurisdiction, rate of return, method of payment and allocation of the rate reduction among customers.

Basic to the argument of the D. C. majority that Section 10(h) of Part I and the antitrust laws were impliedly

repealed is ~~the~~ asserted applicability of Part II of the Act to licensees under Part I, such as Penn Water. That Part II is not applicable to such licensees is shown in Point III herein. However, even if it is applicable, there is nothing in Part II which impliedly repeals Section 10(h) of Part I and the antitrust laws, as shown in Point I herein.

II. The FPC has no authority to direct continuance of or base its orders on contractual arrangements of a state utility corporation adjudged illegal under the laws of its state of incorporation.

The D. C. majority completely ignored that the contractual arrangements on which the FPC orders are based stand adjudicated as violating not only the antitrust laws but also the corporation and public utility statutes and common law of Pennsylvania (the state of incorporation of Penn Water and Safe Harbor) and as being against public policy. As adjudicated by the Fourth Circuit, the contracts destroy the initiative of such corporations as to rates and services, give managerial control of Pennsylvania electric utility corporations to another, and are *ultra vires*. Thus, the illegalities are not in the field of utility "regulation", but involve violations of the fundamental organic laws of Pennsylvania.

Unlike some Federal regulatory statutes, the Federal Power Act contains no provision whatever for overriding state laws but on the contrary affirmatively states the policy of Congress even in the field of regulation only to supplement the authority of states where necessary to regulate transactions beyond the reach of the states.

Not only has Congress not authorized the FPC to approve or require violations of state laws such as are involved here, but it could not constitutionally do so because of the requirements of the Fifth and Tenth Amendments to the Constitution. *Chicago Title & Trust Co.* v. *41-36 Wilcox Building Corp.*, 302 U. S. 120 (1937); *Hopkins Federal Sav-*

ings & Loan Ass'n. v. *Cleary,* 296 U. S. 315 (1935); *Carter* v. *Carter Coal Co.,* 298 U. S. 238 (1936).

III. A licensee subject to regulation under Part I of the Act is not also subject to the different regulatory provisions of Part II.

Penn Water, as a licensee under Part I of the Act, is subject to the separate and different regulatory system provided for licensees under Part I. The D. C. majority's holding that Part II of the Act repealed Part I by implication (despite the reenactment of Part I at the time Part II was enacted) is untenable and contrary to the canons of construction as laid down by this Court in *United States* v. *Jackson,* 302 U. S. 628 (1938).

As confirmed by other Courts of Appeals decisions (*Niagara Falls Power Co.* v. *Federal Power Commission,* 137 F. 2d 787 (1943) and *Alabama Power Co.* v. *Federal Power Commission,* 128 F. 2d 280 (1942)), interstate sales of licensees are subject only to regulation under Part I (by the states involved unless one of them has no regulatory authority or the regulatory authorities of the states are unable to agree, in which case regulation is by the FPC) and Part II merely provides for FPC regulation of electric utilities other than licensees as to transactions which this Court had held could not be reached by State regulation in *Public Utilities Commission* v. *The Attleboro Steam and Electric Co.,* 273 U. S. 84 (1927).

The D. C. majority's holding would subject licensees to two conflicting systems of regulation, since the regulatory system of Part I differs from that of Part II, for example as to the regulatory authority (i.e. State instead of Federal) and as to the nature of the rate base to be used in fixing rates.

Both the language and the legislative history of the Act show that Congress enacted Part II "entirely as a

supplement to, and not a substitute for, State regulation." Moreover, under the express terms of Part I, the license is a contract which cannot be altered (by amendment of the Act or otherwise) without the licensee's consent.

Argument.

I. The FPC has no authority to direct continuance of or base its orders on contractual arrangements adjudged illegal *per se* under the Federal antitrust laws.

The contractual arrangements which are basic to the FPC orders here involved are not of a type which may be lawful or unlawful depending upon whether the facts disclose a "reasonable" or "unreasonable" restraint of trade. Instead, they stand adjudicated as illegal on the basis of contractual restraints on competition of the type which this Court has repeatedly held so vicious as to be illegal *per se*, including price fixing, restrictions on plant expansion, division of territory, exclusive dealing provisions and pooling of revenues. The Fourth Circuit, in the decision as to which this Court denied certiorari, expressly held the contractual arrangements illegal *per se* and stated that regardless of considerations of reasonableness or of intended or actual beneficial result, such contractual arrangements were void on their face in their entirety.* In so holding, the Fourth Circuit was following

---

*The D. C. majority opinion contains a statement that the Fourth Circuit decision is construed as "having done no more than declare illegal under the antitrust laws certain restraints exercised by Baltimore Company upon Penn Water—such as requiring its approval before it could take on new customers or expand generating facilities" (R., Vol. 18, pp. 5374-5). This was an obvious misconstruction, since the Fourth Circuit's opinions expressly held the contracts illegal and void in their entirety as vio-

controlling decisions of this Court.* Under those decisions the Rule of Reason is not applicable to restraints of the type involved here, as the Fourth Circuit pointed out (R., Vol. 18, pp. 5332-3).

Despite the *per se* illegality of the arrangements, the D. C. majority affirmed the FPC orders, holding the antitrust laws inapplicable to those orders on the ground that general regulatory provisions contained in Sections 202 and 205 of Part II of the Act have impliedly repealed the antitrust laws and Section 10(h) of Part I of the Act (which the D. C. majority conceded virtually restates the Sherman Act).**

This holding is in error since there is no authority in any regulatory body to override the antitrust laws in the absence of express provision therefor by Congress (Sec-

lative of the antitrust laws, state law and public policy. Respondents themselves have made no attempt to uphold the D. C. majority's misconstruction of the Fourth Circuit decision, having admitted in their briefs relating to the petition for certiorari that the contracts were invalidated in their entirety. Under the circumstances it is unnecessary to discuss the point at length in this brief.

* *U. S.* v. *Real Estate Boards,* 339 U. S. 485 (1950); *Standard Oil Co. of California* v. *U. S.*, 337 U. S. 293 (1949); *U. S.* v. *Paramount Pictures,* 334 U. S. 131, 143 (1948); *International Salt Co.* v. *U. S.*, 332 U. S. 392, 396 (1947); *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707, 720 (1944); *U. S.* v. *Masonite Corp.*, 316 U. S. 265, 274-276 (1942); *Fashion Guild* v. *F. T. C.*, 312 U. S. 457, 468 (1941); *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, 220-224 (1940); *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392, 397-398 (1927); *U. S.* v. *Reading Co.*, 253 U. S. 26, 48 (1920); *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 327-328 (1904); *Gibbs* v. *Consolidated Gas Company of Baltimore,* 130 U. S. 396 (1889). See also *U. S.* v. *Aluminum Co.*, 148 F. 2d 416, 427 (2d Cir. 1945); *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co.*, 159 F. 2d 306 (4th Cir. 1947), cert. den. 331 U. S. 827; *Lee Line Steamers, Inc.* v. *Memphis, Helena & Rosedale Packet Co.*, 277 Fed. 5, 8 (6th Cir., 1922).

** The respondents' contention in connection with the petition for certiorari, to the effect that this holding was dictum, is without the slightest foundation. The D. C. majority clearly realized that it could not uphold the FPC orders without finding FPC power

tion A of this Point), and Section 10(h) of the Act, expressly reenacted in 1935 simultaneously with the enactment of Part II, specifically reaffirms the applicability of the antitrust laws to electric utilities which are licensees under the Act such as Penn Water and Safe Harbor (Section B of this Point).

The FPC clearly ordered continuance of or based its orders upon contractual provisions which are illegal *per se.* (Section C of this Point.)

A. A Regulatory Body Has No Power to Override the Antitrust Laws Unless Expressly Authorized by Congress To Do So.

The D. C. majority concedes (R., Vol. 18, p. 5373) that "repeals by implication are not favored" and refers to no provision of the Act or of any other act providing for exemption of electric utilities from the antitrust laws or permitting the FPC to override such laws. The Act does not contain, as do some Federal regulatory acts, any provision authorizing the FPC to override the antitrust

---

to absolve illegal contracts from the antitrust laws. Judge Bazelon's opinion, devoting five pages to that subject, stated that to uphold Penn Water's position would be "to substitute antitrust criteria for those of the Federal Power Act" (R., Vol. 18, p. 5376), and sustained various features of the FPC orders by reference to the "obligations" and "entitlements" contained in the illegal contracts (R., Vol. 18, pp. 5390-5393). The concurring Judge (Fahy, J.) stated in a subsequent case that in the *Penn Water* case the Court had dealt with the FPC's power to require continuance of arrangements violating the antitrust laws. *Maryland & Virginia Milk Producers' Association* v. *U. S.*, CCH Trade Reg. Rep. (9th ed.) ¶62,940 (D. C. Cir., 1951). The dissenting Judge below also stated that that was "the basic issue" and devoted his entire 18-page opinion to the point (R., Vol. 18, pp. 5042-5419). Prior to the certiorari proceedings herein the respondents had asserted that the D. C. majority decision was a holding that the FPC has authority to absolve the illegal contracts from the antitrust laws and state law. In the face of all this, any suggestion that the D. C. majority's holding as to the "implied repeal" of the antitrust laws was mere dictum cannot be taken seriously.

laws or granting exemptions from the antitrust laws.* In fact, the Act makes it a condition of all licenses granted thereunder that licensees are prohibited from entering into agreements "to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service" (Section 10(h)).

1. The pattern of Federal regulatory statutes with reference to the antitrust laws.

Congress in enacting regulatory statutes has followed a clear and consistent pattern of giving to certain administrative agencies specific and narrowly confined authority to disregard and grant exemptions from the antitrust laws. The scope of the power varies from agency to agency, and from time to time as to the same agency, but always relates to specific types of transactions. No administrative agency has been given blanket power of this character in its field of regulation. This is clearly illustrated in Appendix A to this brief, which tabulates the nature and dates of enactment of the powers which Congress has from time to time assigned to various Federal administrative bodies in relation to the antitrust laws. Nor has any administrative agency, until the decision below, been held to possess *any* power to override or grant exemptions from the antitrust

* See, for example, Interstate Commerce Act, 49 U. S. C. §§5(11) and 5b(9); Communications Act, 47 U. S. C. §§221(a) and 222(c)(1); and Civil Aeronautics Act, 49 U. S. C. §§492 and 494.

The ICC, FCC and CAB are also, unlike the FPC, given express authority under Section 11 of the Clayton Act (15 U. S. C. §21) to enforce compliance with Sections 2, 3, 7 and 8 thereof (15 U. S. C. §§13, 14, 18 and 19). The CAB was given this power in 1938 when Part II of the Federal Power Act was in effect and the FPC in existence. Clearly, if Congress had wished to give the FPC similar powers it would have followed similar procedure. Under the Federal Power Act (§26 (16 U. S. C. §820)) it is the Attorney General of the United States rather than the FPC who enforces by suit in court the condition incorporated in licenses pursuant to Section 10(h), which reaffirms the antitrust laws.

laws as an implied incident of even the most comprehensive general regulatory authority.

The only statutory provision granting any exemption upon approval of the FPC is found in a recent amendment (December 29, 1950) of Section 7 of the Clayton Act (15 U. S. C. §18) exempting acquisitions of stock or assets approved by the FPC and other specified commissions. This narrow grant of authority would have been unnecessary, so far as the FPC is concerned, if the FPC already had general authority to disregard or give exemptions from the provisions of the antitrust laws. It also clearly shows that a special legislative enactment was necessary to empower the FPC to give such exemptions even with respect to a subject matter (the acquisition of stock or assets) as to which the FPC already had regulatory jurisdiction under Section 203(a) of the Act.

The enactment of this amendment clearly shows the error of the D. C. majority's holding that the antitrust laws were superseded by Part II of the Act. Moreover, the fact that in such amendment Congress did not provide that FPC approval should exempt any arrangements, other than acquisitions of stock or assets, from any of the antitrust laws clearly shows that no such exemption was intended.

The fact that Congress did not intend by the Act to give the FPC authority to disregard or grant exemptions from the antitrust laws is further manifest from the fact that a provision of the 1935 bill (S. 2796, Sec. 203(a)) as passed by the House (see House Report No. 1318, 74th Congress, First Session) permitting the FPC to grant exemptions from other Federal acts, was dropped in conference. Section 203(a) of the bill as finally enacted in the present Act precludes any public utility from selling, leasing or otherwise disposing of its facilities, or merging or consolidating or acquiring the securities of another public utility without

the consent of the FPC. The original provision proposed by the House bill, which was dropped by the conferees, provided that upon certification by the FPC that the proposed transaction would be consistent with the public interest "any Act or Acts of Congress making the proposed transaction unlawful shall not apply."

The D. C. majority states that the Act is analogous to the Interstate Commerce Act (R., Vol. 18, p. 5374).* However, as is plainly illustrated in Appendix A hereto, there is no similarity between these two acts so far as the application of the antitrust laws in the fields of regulation covered by the respective acts is concerned. The Interstate Commerce Act contains *express provisions* (49 U. S. C. §§5(11) and 5b (9)), authorizing the Interstate Commerce Commission to approve, and thereby exempt, specified transactions, including revenue pooling arrangements (49 U. S. C. §5(1)), from the antitrust laws.** The Federal

* In support of this statement the D. C. majority cites *Northwestern Pub. Serv. Co.* v. *Montana-Dakota Util. Co.*, 181 F. 2d 19, 22 (8th Cir. 1950). That case, however, did not involve any question under the antitrust laws or the power of either the FPC or the ICC to grant any exemption therefrom. It referred simply to the similarity of the *rate regulation* jurisdiction of the two Commissions.

** Prior to the enactment of such express provisions, this Court held transactions of the kind subsequently exempted thereby to be illegal. *U. S.* v. *Southern Pacific Co.*, 259 U. S. 214 (1922); *U. S.* v. *Lehigh Valley R. Co.*, 254 U. S. 255 (1920); *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945). Under the express statutory authorization given the ICC by Congress after those cases were decided, the ICC approved the same or similar transactions without any suggestion that it would have had power to do so in the absence of such statutory authorization. *In the Matter of the Application of Southern Pacific Company to Acquire Control by Lease and by Stock Ownership of Central Pacific Railway Company*, Fin. Docket No. 2613, 76 I. C. C. 508 (1923); *Western Traffic Association—Agreements*, 276 I. C. C. 183 (1949). In *McLean Trucking Co.* v. *U. S.*, 321 U. S. 67, 86 (1944), this Court stated that even in the case of transactions which the ICC was expressly authorized by statute to exempt from the antitrust laws, the FCC was not entitled to ignore the policy of the antitrust laws in making its decisions.

Power Act, on the other hand, in addition to containing no authorization whatever to the FPC to exempt any transactions from the antitrust laws, expressly restates, in Section 10(h), the substance of the Sherman Act.

2. **Applicable decisions of this Court.**

The D. C. majority's holding that the Act repeals the antitrust laws by implication is squarely contrary to the decisions of this Court. This Court has frequently held that there is no implied repeal of, or exemption from, the antitrust laws, and even express authorizations to regulatory bodies to exempt from the antitrust laws have been strictly construed and the antitrust laws enforced as to transactions other than those expressly authorized to be exempted.

For example, in *U. S.* v. *Borden Co.*, 308 U. S. 188 (1939), the District Court had dismissed certain counts of an indictment under the Sherman Act on the ground that the Agricultural Marketing Agreement Act (50 Stat. 248, 7 U. S. C. 671 *et seq.*) had vested in the Secretary of Agriculture plenary power over the marketing of milk and that as a result such marketing "is removed from the purview of the Sherman Act" (308 U. S. at 197).* This Court reversed

* Other decisions of this Court are *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945) [holding application of antitrust laws to price-fixing conspiracy of railroads not impliedly repealed by rate regulation provisions of the Interstate Commerce Act]; *U. S. Alkali Export Ass'n.* v. *U. S.*, 325 U. S. 196 (1945) [holding provisions of Sherman Act not impliedly repealed by Webb-Pomerene Act giving Federal Trade Commission power to investigate and make recommendations for adjustment of activities of export associations in restraint of trade]; *U. S.* v. *South-Eastern Underwriters Ass'n.*, 322 U. S. 533 (1944) [holding that State regulation could not affect application of antitrust laws to insurance companies and only Congress, not the Courts, can give exemption]; *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940) [holding National Industrial Recovery Act did not authorize exemptions from

unanimously. The Court pointed out that there was no express provision in the Agricultural Marketing Agreement Act for such an exemption, except as to carefully defined specific transactions, and reaffirmed the "cardinal principle of construction that repeals by implication are not favored" (p. 198). The Court stated in part (pp. 198-9):

> "When there are two acts upon the same subject, the rule is to give effect to both if possible. * * * as was said by Mr. Justice Story in *Wood* v. *United States*, 16 Pet. 342, 362, 363, '* * *.' There must be 'a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy'."

Unlike the Act, the statute involved in the *Borden* case contained provisions permitting antitrust exemption under certain circumstances. With respect to these provisions, this Court said (p. 201):

> "These explicit provisions requiring official participation and authorization show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inappli-

---

antitrust laws except to the extent expressly provided therein]; *Western Union Division* v. *United States*, 338 U. S. 864 (1949), affirming 87 F. Supp. 324 (D. D. C. 1949) [see particularly statement of three-judge court at p. 337 of 87 F. Supp. that "absent a specific congressional permission, an administr tive agency cannot validate an agreement between competitors which is otherwise invalid under the anti-trust laws"] See also, *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co.*, 159 F. 2d 306 (4th Cir. 1947), cert. den. 331 U. S. 827; *Hinton* v. *Columbia River Packers Assn.*, 131 F. 2d 88 (9th Cir. 1942); *Manaka* v. *Monterey Sardine Industries*, 41 F. Supp. 531 (N. D. Calif. 1941). After the decision in the *Georgia* case, above cited, Congress enacted the Reed-Bulwinkle Act of 1948 (49 U. S. C. §5b(9)), specifically exempting certain railroad price-fixing agreements when approved by the Interstate Commerce Commission.

cable. If Congress had desired to grant any further immunity, Congress doubtless would have said so." *

Although the D. C. majority concedes that regulated industries are not exempt from the antitrust laws, it has actually held in this case that, solely because Sections 202 and 205 of the Act give the FPC general regulatory jurisdiction over certain electric utilities, the Act is repugnant to and supersedes the antitrust laws with respect to such utilities. But this Court has repeatedly held that the antitrust laws are applicable to regulated industries in the absence of statutory provisions for specific exemption.**

The above-cited decisions of this Court were the basis of the adjudication by the Fourth Circuit that the FPC, having been given no authorization by Congress to override or grant exemption from the antitrust laws, could not validate the *per se* illegal Baltimore and Safe Harbor contracts and that any arrangements which the FPC might approve would have to be on a basis which would not offend the antitrust laws (R., Vol. 18, p. 5349).

---

* Compare the very limited authority to exempt from the antitrust laws granted to the FPC by the recent amendment to the Clayton Act passed in December, 1950. This authority to exempt clearly does not cover transactions of the type involved here, but only acquisitions of stock or assets. The above statement of and quotations from the *Borden* case are taken substantially from the government's brief in the *Far East Conference* case, argued in this court on January 29, 1952, October term 1951, No. 15 Misc., in which the government took the same position that petitioners take here, namely, that a regulatory body has no authority to override or grant exemptions from the antitrust laws except to the extent, if any, that Congress has specifically conferred such power upon it.

** *Georgia* v. *Pennsylvania R. Co., supra; U. S.* v. *South-Eastern Underwriters Ass'n., supra; U. S.* v. *Terminal R. Ass'n.*, 224 U. S. 383 (1912); *U. S.* v. *Southern Pacific Co.*, 259 U. S. 214 (1922); *U. S.* v. *Reading Co.*, 253 U. S. 26 (1920); *U. S.* v. *Union Pacific R. Co.*, 226 U. S. 61 (1912). See, also, *U. S. Telephone Co.* v. *Central Union Telephone Co.*, 202 F. 66 (6th Cir. 1913), cert. den. 229 U. S. 620; *In re American Fuel & Power Co.*, 122 F. 2d 223 (6th Cir. 1941).

3. **Pertinent rulings of other Federal regulatory agencies and the Attorney General.**

In its inexplicable insistence in this case upon arrogating to itself the power to override the antitrust laws in order to give Consolidated a strangle-hold over potential competitors, the FPC stands alone among government agencies. Other regulatory bodies have uniformly acknowledged that they have no power to override or grant exemption from the antitrust laws except in strict accordance with express Congressional authorization.

For example, the Interstate Commerce Commission has held that Section 20a of the Interstate Commerce Act, giving it "exclusive and plenary jurisdiction" over issuance of carriers' securities, did not impliedly repeal Section 10 of the Clayton Act (15 U. S. C. §20) regarding competitive bidding for such securities. That Commission emphasized that Section 20a did not contain any specific provision for exemption from these Clayton Act requirements and that where Congress had intended exemptions from the antitrust laws they had elsewhere been expressly provided for in the Interstate Commerce Act. *Columbia Terminals Co.—Issuance of Notes*, 40 M. C. C. 288, 293 (1945).

Similarly, the Federal Communications Commission in its *Report on Chain Broadcasting*, May 2, 1941, in discussing its regulatory powers with respect to broadcasting said (p. 46):

> "In the absence of Congressional action exempting the industry from the anti-trust laws, we are not at liberty to condone practices which tend to monopoly and contractual restrictions destructive of freedom of trade and competitive opportunity."

The Attorney General, in an opinion to the Secretary of State dated October 31, 1944 (Vol. 40, Att. Gen. Op. p. 335),

advised that the Civil Aeronautics Board has no authority to exempt agreements from the antitrust laws except to the extent Congress has specifically so provided, and that statutory provisions granting such authority must be strictly complied with in order to be effective.*

These rulings of other regulatory agencies and the Attorney General are clearly sound. As the D. C. majority admits (R., Vol. 18, p. 5374) the initial duty with respect to the promulgation of reasonable rates and adequate services rests upon the utilities themselves and is a "condition precedent to proper operation of the rate-making process." It is the function of regulatory commissions to *police* this duty, not *assume* it. The public is entitled to the benefits of competitive rate making by utilities within the maximum limits which would be permitted by the regulatory body. See *Georgia* v. *Pennsylvania R. Co.*, *supra* (324 U. S. at pp. 458-9).

---

* This ruling of the Attorney General reflects the position which the Department of Justice has taken in case after case. The Department has uniformly maintained the position that there is no implied repeal of or exemption from the antitrust laws; that a regulatory body has power to override the antitrust laws only if and to the extent expressly provided in the regulatory statute; and that there is no Congressional policy exempting transactions in the general field of regulation of any regulatory authority. See, for example, the Government's briefs in the following cases: *U. S.* v. *Pacific & Arctic Co.*, 228 U. S. 87 (1913); *U. S.* v. *Borden Co.*, 308 U. S. 188 (1939); *U. S.* v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1944); *U. S. Alkali Export Assn.* v. *U. S.*, 325 U. S. 196 (1945); *Schwegmann Brothers* v. *Calvert Corp.*, 341 U. S. 384 (1951); *U. S.* v. *Far East Conference*, 94 F. Supp. 900 (D. N. J. 1951) argued in this Court on January 29, 1952 (October Term 1951, No. 15 Misc.); *Isbrandtsen Co.* v. *U. S.*, 96 F. Supp. 883 (S. D. N. Y. 1951), argued in this Court on January 30, 1952 (October Term 1951, No. 134, 135); *U. S.* v. *Railway Express Agency, Inc.*, 1952 C. C. H. Trade Regulation Service ¶67,215 (D. Del., December 7, 1951).

4. The provisions of the Act relied on by the D. C. majority do not support its decision.

The regulatory provisions of Part II of the Act which the D. C. majority regarded as superseding the antitrust laws are said to be contained in Sections 202* and 205. These Sections contain ordinary regulatory provisions.

Section 202 of the Act (16 U. S. C. §824 a) authorizes the FPC to promote and encourage voluntary interconnection and coordination of public utility facilities and to require, subject to certain limitations, when it finds it necessary or appropriate in the public interest, the establishment of physical connection of transmission facilities and to prescribe the terms and conditions of the arrangement to be made therefor.

Section 205 of the Act provides that rates shall be just and reasonable, prohibits preferences and prescribes the rules for the filing of rate schedules. All of the other Federal regulatory statutes discussed above contain similar provisions.**

These Sections 202 and 205 include no provision for exemption from the antitrust laws and clearly do not destroy the specific mandate contained in Section 10(h) of the Act and in the antitrust laws. Nor is there anything

* Section 202 is not involved in this proceeding. This proceeding was not begun under that Section. There was no application by any state commission or any other person, as required by the Section, asking the FPC to direct establishment of any physical connection of transmission facilities. The facilities of the companies had already been physically connected for many years.

** Other Federal regulatory statutes (such as the Interstate Commerce Act, Sections 1, 3(4) and (5), and 6(11) (49 U. S. C. §§1, 3(4) and (5) and 6(11)), the Communications Act, Section 201 (47 U. S. C. §201), and the Civil Aeronautics Act, Section 1002 (49 U. S. C. 642)), provide for interconnection of facilities and the fixing of terms of through service and joint rates, but these have not been held to authorize the granting of exemption from antitrust laws. See *Georgia* v. *Pennsylvania R. Co., supra* (324 U. S. 439, 456-457).

in these sections which even looks toward the elimination of competition between public utilities, let alone authorizing restrictive or other types of agreements which would permit a private utility to suppress such competition. On the contrary, Section 202 expressly states that the purpose of interconnection of facilities to be fostered thereby is that "of assuring an abundant supply of electrical energy throughout the United States."

There is no repugnancy between these regulatory provisions and the antitrust laws. The FPC can effectuate the purposes of these provisions, without overriding those laws, by approving the furnishing of power and payment therefor of unit rates on the usual basis without managerial control of one company over another. As Judge Miller's dissenting opinion below forcefully pointed out (R., Vol. 18, p. 5415):

> "Section 202 * * * empowers the Commission to require the interconnection and co-ordination of the facilities of the two utilities. But neither that section nor any other section of Part II authorizes the Commission to require interconnection and co-ordination of facilities under terms and conditions which will result in a violation of the Sherman Act. The Commission can exercise its power under § 202 and under all of Part II without setting up an arrangement which is unlawful under anti-trust statutes. The Fourth Circuit intimated as much when it suggested that the interconnection of facilities and interchange of energy be continued 'by some method which would meet with the approval of the appropriate regulatory authority and will not offend either the anti-trust laws or the utility laws of Pennsylvania.' The majority opinion does not suggest any reason why that cannot be done by the Commission.

"Since the Power Commission can perform all its functions under Part II without creating a violation of the Sherman Act, there is no repugnancy between the two statutes, and no room for the court to say that Part II superseded the anti-trust statutes."

Moreover, as the Fourth Circuit said in its decision affirming the illegality of the Safe Harbor contract (Pamphlet op. p. 15).

"Indeed it is impossible to say that an effective power pool cannot be maintained without the prohibitions upon individual action contained in the two contracts which, for this purpose, may be considered one."

5. The cases relied on by the D. C. majority do not support its decision.

The cases cited by the D. C. majority for its holding that the Act repeals the antitrust laws by implication and permits the FPC to ignore the antitrust laws, support the petitioners' position here to the extent that they are applicable at all. The *Borden* case has been discussed above and clearly supports the petitioners. The *U. S. Navigation Co.*, *Sunshine* and *Rock Royal* cases (284 U. S. 474; 310 U. S. 381; 307 U. S. 533) involved regulatory statutes which, unlike the Act, contained express provisions for exemption from the antitrust laws. *Terminal Warehouse Co.* v. *Penn R. Co.*, 297 U. S. 500 (1936) and *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945) held that regulated industries are subject to the antitrust laws even though their rates and services are subject to the exclusive jurisdiction of regulatory bodies. *U. S. Alkali Export Assn.* v. *U. S.*, 325 U. S. 196 (1945) is strong authority against the D. C. majority's holding. This Court there held that the Webb-Pomerene Act, giving the Federal Trade Commission the

power to investigate violations of the Sherman Act, did not empower that Commission to enforce the Sherman Act or in any way repeal the provisions of the latter act.

In *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, 162 (1922), which the D. C. majority cites for the proposition that a rate is not necessarily illegal because it is a *result* of a conspiracy in restraint of trade in violation of the antitrust laws, the attack was solely on the amount (*i.e.*, the rate) specified in an order of the Interstate Commerce Commission, and the Commission's order did not incorporate or embody the illegal conspiracy or arrangement alleged to exist. The FPC orders here involved, while they purport to be only rate orders, do embody illegal arrangements, require their continuance, and in critical respects are based on the assumed existence and continuance of those arrangements.

Furthermore, in the *Keogh* case, this Court simply held that a rate already established by the Interstate Commerce Commission in one proceeding could not be attacked in a court in another proceeding. Here we have an appeal from the orders issued in the very proceeding in which the rates were prescribed, in which the appellate courts have statutory authority either to set aside the orders or to require that they be modified in the light of the established illegalities of the contractual situation. There is no collateral attack here on a commission order which has gone into effect. The Courts are now determining whether the orders shall go into effect.*

---

* A further distinction of the *Keogh* case, which upheld primary jurisdiction in the Interstate Commerce Commission with regard to a treble damage action based on alleged illegal rates, is that the Interstate Commerce Act expressly provided an exclusive remedy for recovery of such damages in a proceeding before the ICC. The Federal Power Act clearly contains no provision making proceedings before the FPC a remedy (either exclusive or non-exclusive) for antitrust law violations.

The D. C. majority states (R., Vol. 18, pp. 5372-3) that Congress and the states may authorize arrangements which are in violation of the antitrust laws and cites *Parker* v. *Brown*, 317 U. S. 341 (1943), but that case has no application to the present situation and does not support the holding of the Court that the FPC has authority to validate arrangements otherwise illegal under the antitrust laws. The case has nothing to do with the scope of the authority of the FPC under the Federal Power Act. In stating in connection with the citation of this case that Congress may authorize arrangements otherwise in violation of the antitrust laws, the D. C. majority by-passed the question involved here, namely whether Congress has done so. The *Parker* case involved only the validity of the California Agricultural Prorate Act, under which the State of California fixed quotas for the production of raisins, and held that since the fixing of such quotas was an act of that State, not of private parties, the California Act was not in conflict with the Sherman Act because the Sherman Act is not applicable to the actions of a State.* This Court held (317 U. S. at pp. 351-2) that even a State "does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful".

Here the FPC *is* attempting to authorize violation of the antitrust laws by Consolidated (a *private party*) and to base its orders upon private agreements which are in violation of the antitrust laws. It should be noted that Consolidated in exercising restraints over Penn Water under the contractual arrangements would not be acting in accord-

---

* The FPC, of course, is not a State but a federal agency which has no authority to override any Federal law unless expressly authorized to do so by Congress, and the FPC has been given no such authority except with respect to acquisitions of stock or assets under Section 7 of the Clayton Act.

ance with any statutory regulatory standards but only in its own private interest or at its own whim.*

In *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 389 (1951), this Court, citing its decision in the *Parker* case, reaffirmed that a State may not permit private parties to impose restraints which the Sherman Act forbids.

The *Lowenstein* case (69 Fed. 908), also cited by the D. C. majority (R., Vol. 18, p. 5373), is similar to the *Parker* case, holding that a State may *itself* operate a monopoly in the liquor trade. The *Olsen* case (195 U. S. 332) (R., Vol. 18, p. 5373) held that a *State* does not violate the antitrust laws by licensing pilots. The only issue raised by the *Olsen* case was whether a State may grant exclusive franchises. Such action is not comparable to exempting *private agreements* permitting one corporation to suppress competition with it by another.

6. No question of exhaustion of administrative remedy is involved.

The D. C. majority states (R., Vol. 18, pp. 5375-6) that §205 (d) of the Act (16 U. S. C. §824d (d)) requires Penn Water to submit new arrangements and rate schedules to the FPC for approval, and that if Penn Water is dissatisfied with the decision of the FPC with respect thereto it may take an appeal. But the petitioners have in this case prop-

---

* Even Congress could not constitutionally place one independent company under the domination of another. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311-12 (1936). As the Fourth Circuit pointed out (R., Vol. 18, pp. 5329-30) Consolidated has consistently exercised its powers in disregard of the interests of both Penn Water and the public. The FPC had no authority to prevent or to supervise such actions by Consolidated and has never attempted to assert any such authority. Even if such authority existed in the FPC, the contractual arrangements, as the Fourth Circuit pointed out (Pamphlet Op., pp. 15-16), deprived Penn Water of the right to initiate proceedings before regulatory bodies with respect to matters affecting its business and the public interest.

erly exhausted the administrative remedy provided in the Act because they raised the points involved before the FPC itself* and, after rejection of those points by the FPC in its orders, petitioned the D. C. Circuit and in turn this Court for a review of such orders, pursuing exactly the remedy specified in Section 313(b) of the Act.** Furthermore, Penn Water did in fact file new rate schedules for service to Consolidated on the usual unit rate basis as soon as the preliminary injunction to perform the Baltimore and Safe Harbor contracts was dissolved, but the FPC rejected such schedules (Tr. 5628-30) on the ground, among others, that to file new schedules Penn Water "must recognize" the existing FPC orders, thus possibly barring itself from continuing to appeal in the courts from such orders.

The procedure suggested by the D. C. majority would require Penn Water (i) to accept the present rate orders (despite the fact that they are being properly reviewed under the Act), (ii) to file new schedules with the FPC embodying a new arrangement and (iii) to continue illegal arrangements until final determination (probably after several appeals) of such new proceeding. Any such procedure could only result in confusion and delay.

Under Section 205 of the Act a rate schedule becomes effective upon its filing, without necessity of affirmative FPC approval, and continues in effect unless and until affirmatively disapproved by the FPC. Thus, the D. C. majority's interpretation of Section 205 would mean that

---

* The FPC, in its brief below in opposition to petitioners' motions to set aside the FPC orders, expressly stated (Tr. 5552) that the arguments advanced by Penn Water "are not new, having been urged upon the Commission and considered by it and having been repeatedly urged in this proceeding before this Court."

** Nor is there here any "collateral attack" on an FPC order which has become effective. The FPC orders have been stayed pending final determination in this case whether they shall become effective.

the *mere filing* of illegal arrangements would be sufficient to exempt them indefinitely from the antitrust laws or other laws making them illegal unless and until the FPC affirmatively disapproved them. Congress surely cannot have intended to enable private parties to obtain exemption from the antitrust laws for contracts suppressing competition by the mere act of filing them with the FPC.

Those Federal regulatory acts which give authority to the regulatory body to override the antitrust laws set up very carefully defined standards and safeguards.* The decision of the D. C. majority would give the FPC authority to override the antitrust laws without such Congressionally created standards and safeguards.

To uphold the D. C. majority's decision in this case would constitute virtual abandonment of the antitrust laws so far as regulated industries are concerned. It would reverse the entire pattern and history of Federal regulatory enactments. It would mean that, although Congress has followed the policy of leaving the antitrust laws in full effect except where specific exceptions are provided for in

---

* See, for example, Section 5 of the Interstate Commerce Act (49 U. S. C. §5 (1) (11)) permitting the ICC to exempt arrangements for the pooling and division of earnings which requires a specific finding by that Commission that the arrangement will not unduly restrain competition; Section 5a(9) of the same Act (49 U. S. C. §5b(9)) authorizing the ICC to exempt price fixing agreements, which requires a specific finding that the arrangements will further the national transportation policy as set forth in the Interstate Commerce Act; and Sections 408, 412 and 414 of the Civil Aeronautics Act (49 U. S. C. §488, 492 and 494) authorizing the CAB to exempt various transactions, including arrangements for the pooling and division of earnings, which prohibit the exemption in some cases if a monopoly and restraint of competition would result and, in other cases, if the CAB finds the transactions would violate the Civil Aeronautics Act. This would include the requirement of the latter Act (Section 2, 49 U. S. C. §402) that the CAB encourage competition to the extent necessary to insure the sound development of the air transportation system.

regulatory statutes, henceforth the antitrust laws would have no effect whatever unless expressly reenacted in the regulatory statute. Indeed, under the D. C. majority's decision even with such specific reenactment the antitrust laws would not survive enactment of a general regulatory statute, because in the Act itself Section 10(h) substantially restates the Sherman Act.

Affirmance of the D. C. majority's decision would give all regulatory agencies *carte blanche* not only to ignore the antitrust laws but to authorize private parties to ignore them. The ICC, the FCC, the CAB and other administrative agencies would no longer need to confine themselves, in authorizing departure from the antitrust laws, to the specific transactions as to which exemption is authorized by the regulatory statutes under which they operate, but could ignore the antitrust laws in any and all instances. If the FPC in this case despite the antitrust laws can validate arrangements which have been specifically adjudged illegal and void *per se,* there is no longer any limit to the power of any regulatory agency to disregard the antitrust laws at its pleasure and to choose, as the FPC has done here, which companies shall be given power to suppress competition and which ones shall be the victims of that suppression.

B. Section 10(h) of the Act, reaffirming the Antitrust Laws, was not impliedly repealed by Part II of such Act and there is no repugnancy between these Provisions.

The D. C. majority concedes (R., Vol. 18, p. 5377) that Section 10(h) of Part I of the Act "does indeed virtually restate the Sherman Act" but argues that the section "is found only in Part I of the Federal Power Act, which deals with water power licensees, and not in Part II, dealing with public utilities selling electric energy in interstate com-

merce at wholesale." The D. C. majority therefore concludes that "Congress did not intend to make licensees which are also Part II companies, such as Penn Water, subject to §10(h)."*

There is no basis for this conclusion. Far from repealing Section 10(h), the Act of 1935 reenacted it. The above cited decisions of this Court, ruling against repeals by implication and holding that exceptions to the antitrust laws cannot be made by the courts in the absence of express Congressional provision, are particularly applicable where, as in the case of Section 10(h), the provision claimed to have been impliedly repealed is contained in the very statute which is claimed to have repealed it.

Section 10(h) is one of a number of conditions required by Congress to be incorporated in licenses granted under the Act, and there is no suggestion by the D. C. majority that any of the other conditions imposed by Section 10 have been repealed either expressly or by implication. The D. C. majority treats Section 10(h) as though it were contained in a statute enacted *prior* to Part II of the Act, whereas in fact Section 10(h) was reenacted as a section of Part I at the same time Part II was enacted. In such reenactment various changes not pertinent here were made in Part I but no change was made in Section 10(h). It is clear, therefore, that Congress intended no change in Section 10(h).

*Petitioners contend (Point III below) that Penn Water, as a licensee subject to the comprehensive system of regulation provided in Part I, is not also subject to the different regulatory provisions of Part II to which certain public utilities other than licensees are subject. The inapplicability of Part II would remove all basis for the decision of the D. C. majority that the antitrust laws and Section 10(h) have been impliedly repealed as applied to Penn Water. But it is petitioners' contention here that even assuming the applicability of Part II to Penn Water, the antitrust laws and Section 10(h) nevertheless remain applicable and that no provision of the Act, whether contained in Part I or Part II, impliedly repeals either the antitrust laws or Section 10(h) of the Act.

By its express terms Section 10(h) is a required condition of "all licenses", but the D. C. majority's decision would in effect rewrite the statute to make Section 10(h) applicable to "all licenses except those issued to licensees which are subject to regulation under Part II." The argument of the D. C. majority that Section 10(h) was repealed by the enactment of Part II (so far as concerns licensees which enter interstate commerce, but presumably not licensees which do not enter such commerce) is obviously unsound on its face.

Since 1920 the statute has made it mandatory that all licensees have various specified conditions incorporated in their licenses including Section 10(h). There is no discretion in this respect on the part of the FPC. It is inconceivable that Congress intended one of those conditions automatically to become null and void if, as, and when the licensee should enter into interstate commerce, but remain binding on other licensees, or intended that licensees who were formerly expressly prohibited from making agreements in restraint of trade be not only permitted, but encouraged, to do so upon entering interstate commerce.

The D. C. majority bases its conclusion on the assertion (R., Vol. 18, p. 5377) that one of the primary objectives of Part II is "to limit the output of electrical energy" citing Section 202(a) (16 U. S. C. §824a(a)). Actually, however, Part II has precisely the opposite purpose. Section 202(a) expressly includes as the first purpose of Part II "the purpose of assuring an abundant supply of electric energy."

It seems clear that Section 10(h) was included in the Act to extend the antitrust laws to *all* licensees, whether or not engaged in interstate commerce. As was correctly stated in the Fourth Circuit decision as to which certiorari was denied by this Court (R., Vol. 18, p. 5338):

> "The prohibition against monopolistic combinations was included among the conditions upon which

the Power Commission may issue licenses for the construction and maintenance of power projects—not to deprive the courts of jurisdiction to enforce the anti-trust acts, but to make it perfectly clear that no licensee can legally agree to limit output, restrain trade or fix prices. *The condition was a reaffirmance of the Sherman Act and was designed to restrict rather than to enlarge the Commission's authority.*"*

There is no repugnancy whatever between Section 10(h) and Part II; as the dissenting opinion below clearly demonstrates and as the Fourth Circuit pointed out, interconnection and coordination of facilities can be maintained without offending the antitrust laws. The Pennsylvania customers to the north, as well as numerous electric utilities in other parts of the country, are interconnected and interchange capacity and energy and maintain efficient pooling of power resources with contractual arrangements on the customary unit rate basis without control by any company over any other company or other restraints on competition. The unusual revenue pooling and restrictive controls of the Baltimore and Safe Harbor contracts are wholly unnecessary to effective interconnection and pooling of power resources.

It is significant that in an effort to support its assertion of repugnancy the D. C. majority found it necessary to resort to the argument that a Section which expresses a purpose of assuring an abundant supply of electrical energy (§202(a)) is the opposite of a Section which bans agreements to limit the output of electrical energy (§10(h)).**

---

* Italics supplied here and elsewhere in this brief unless otherwise noted.

** Contrary to the reasoning of the D. C. majority, respondents have argued that Section 10(h) gives the FPC authority to enforce the antitrust laws and pass on antitrust matters. The Fourth Circuit in the Baltimore contract case disposed of this argument

C. The FPC Clearly Ordered Continuance of or Based its Orders Upon, Contractual Provisions Which are Illegal *Per Se.*

1. Pertinent Provisions of the FPC Orders.

The opinion of the D. C. majority treats the contractual arrangements as having been ordered by the FPC to continue and upholds the FPC's authority to order such continuance. This has been the position taken by Respondents, Consolidated and the Maryland Commission, as to both the Baltimore and Safe Harbor contracts. It is also the position which has been taken by the FPC regarding the Safe Harbor contract. As regards the Baltimore contract, counsel for the FPC have taken different positions at different times. In their brief below they took the position that the rate schedule which the FPC prescribed "permits Penn Water's facilities to be operated as though they were under common ownership with Baltimore Company's [Consolidated's] facilities" (Tr. 5574). In their memorandum relating to the petition for certiorari, however, government counsel took the position in substance that the FPC had authority to, but did not in fact, order continuance of any of the provisions of the Baltimore contract held illegal by the Fourth Circuit, asserting that Articles IV and V thereof were the only provisions which were held illegal and that these articles were not approved by the FPC.

Since the principal question for decision by this Court is the authority of the FPC to direct continuance of or

---

by pointing out that Section 10(h) was not an operative provision of the Act, but simply a provision to be incorporated in all licenses, and that the function of the FPC was limited to calling any violation of a condition of a license to the attention of the Attorney General for such action, if any, as he might care to take to institute a court proceeding to enjoin the violation, or to revoke the license. The Fourth Circuit also pointed out that the Secretary of War has a power under the Act similar to that of the FPC (R., Vol. 18, pp. 5336-9). In any event, any proceedings to enforce Section 10(h) must be brought before the courts for their decision, not the FPC.

base its orders on such illegal contractual arrangements, it is believed that it will be helpful to the Court to set forth pertinent provisions of the FPC orders regarding the contractual arrangements.

(a) *The FPC Orders Required Continuance of Contractual Arrangements Adjudged Illegal.*

In its opinion denying rehearing (Feb. 28, 1949, R., Vol. 16, p. 5178) the FPC stated that it was immaterial to its rate orders that the Baltimore and Safe Harbor contracts might be illegal and directed continuance of the Baltimore contract as follows:

> "In our opinion and order we took care to leave the continuation of the integrated and interconnected system in full effect, merely changing the rates, as shown by our statements wherein we specifically stipulated that
>
> "'The present arrangement whereby sales to Pennsylvania customers are made on a firm basis on definite rate schedules whereas Baltimore Company* takes what is left and assures Respondents [Penn Water and Transmission Company] of the recovery of all proper operating expenses, depreciation, taxes and a fair return, is the most practicable under the circumstances. *That arrangement will, therefore, be continued* * * * '" (R., Vol. 16, pp. 5184-5). (Matter in brackets added.)**

---

* Throughout the FPC orders and opinions Consolidated is referred to as Baltimore Company.

** This requirement was also contained (as indicated in the quotation above) in the FPC's first opinion (Jan. 5, 1949), (R., Vol. 16, p. 4981), and in finding 37 and par. (D) of its first order (R., Vol. 16, pp. 4994, 4995).

The first FPC opinion (No. 173) was incorporated in, and made a part of, its first order (Jan. 5, 1949), and the second order (Feb. 28, 1949) did the same with the second opinion (No. 173A) (R., Vol. 16, pp. 4983, 5192).

In paragraph (11) of its first order the FPC said:

> "The contracts referred to in (6) and (7) above [the Baltimore and Safe Harbor contracts], facilitate the achievement of those objectives *particularly by the methods of payment which they provide,* and by reason of the fact that generation of energy is directed by the coordinated action of load dispatchers in the City of Baltimore, representing the three system companies." (R., Vol. 16, p. 4987).

It is thus clear that the FPC specifically ordered the continuance of the illegal revenue pooling provisions of the Baltimore contract.

In the rate orders and opinions the FPC praised and commended *all* of the restrictive provisions of the Baltimore contract.

For example, in its opinion of February 28, 1949 denying rehearing, the FPC said:

> "By the terms of those contracts the installation of additional facilities by Penn Water is subject to approval by Baltimore Company,[2] to assure coordinated planning and investment to meet the growing power needs of the system as a whole with resulting additional economies and consumer benefits." (R., Vol. 16, p. 5184).

Footnote 2 referred to above quotes in full Article V of the Baltimore contract, the provision restraining Penn Water's plant expansion, expressly held illegal on its face by the Fourth Circuit.

In that opinion the FPC further said:

> "In this case refusal of Penn Water to receive energy originating outside of Pennsylvania from Baltimore Company would not be merely a termination of the purchase and sale of that energy (i.e., a

> cancellation subject to Section 35.5 of the Rules) but would constitute a change in rates and service in several aspects which cannot be accomplished except in compliance with requirements prescribed under Section 205 of the Federal Power Act." (R., Vol. 16, p. 5186).

Here the FPC is referring to the power of Consolidated under the Baltimore contract which the Fourth Circuit specifically held to be an exclusive dealing provision on its face in violation of Section 3 of the Clayton Act (R., Vol. 18, p. 5331), since it required Penn Water to purchase energy from Consolidated by prohibiting Penn Water from purchasing such energy from others without the consent of Consolidated.

Again, in its order of October 27, 1949,* the FPC in prescribing allegedly proper rate schedules which called for the residual specified return formula contained in the Baltimore contract, stated:

> "The foregoing provisions supersede only the rates and charges heretofore made, demanded, collected or assessed against Baltimore Company by Penn Water and Transmission Company. All other provisions of the aforementioned contracts, in and of themselves lawful prescribing or defining the power, energy and transmission services to be furnished, or any classification, practice, regulation or rule affecting such services, which several provisions are incorporated herein by reference, shall be observed and be in force." (R., Vol. 17, p. 5283.)

FPC counsel now contend that by the phrase "provisions of the aforementioned contracts, in and of themselves law-

---

* This was the order by which the FPC further reduced Penn Water's rates, without notice or opportunity for hearing and after exclusive jurisdiction had vested in the D. C. Circuit.

ful" in this paragraph the FPC intended to exclude from the continuing arrangements contractual provisions which might be subsequently held by the courts to be illegal. FPC counsel then state that Articles IV and V are the illegal provisions, and the only illegal provisions, and are excluded.

A conclusive answer is that, in the very same order (R., Vol. 17, pp. 5273-4), the FPC expressly provides that it is continuing the exclusive dealing provision contained in in Article IV and elsewhere in the Baltimore contract, which was held to be a *per se* violation of Section 3 of the Clayton Act.

There is a further answer. These rate schedules were prescribed by the FPC (October, 1949) before even the first District Court decision was rendered (February, 1950) and months before the Fourth Circuit decision declaring the Baltimore contract illegal (September, 1950). It seems disingenuous to contend that an administrative body like the FPC was directing continuance of an arrangement indefinite in scope and dependent on subsequent decisions which might be rendered by courts in other cases, either the Baltimore contract case or the Safe Harbor contract case or some other case, none of which had then been decided.

The only tenable construction is that the phrase "provisions of the aforementioned contracts, in and of themselves lawful" was an attempt by the FPC to support its previous orders by a bold assertion that all of the provisions of the Baltimore contract, except the rates, are lawful.

The D. C. majority nowhere states that the FPC orders do not require continuance of contractual arrangements illegal under the antitrust laws. In fact it refers to the scope of the FPC's action as governing "the operations and arrangements under scrutiny" and states (making

no exception as to any restrictive provisions) that Penn Water can only change its operations, contracts, arrangements, etc., in accordance with the Act and with the consent of the FPC (R., Vol. 18, pp. 5375-6). The D. C. majority then supports critical features in the FPC orders, just as the FPC did, on the assumed continued existence of the contracts, as appears below.*

(b) *The FPC Based Critical Features of Its Orders Upon the Assumed Existence and Continuance of the Illegal Contracts.*

(i) *The prescribed rate of return was based on the assumption that Penn Water would receive the "stabilized income" provided by the Baltimore contract until 1980.*

The FPC, prospectively (*i.e.*, from and after February 1, 1949, the specified operative date of the FPC orders if they become effective), reduced the amounts payable by Penn Water's utility customers so as to limit Penn Water's return to the abnormally low rate of 5¼% per annum of depreciated original cost (and then by a subsequent order to 4¾%), on the express basis that "The contract with Baltimore Company [Consolidated] assures Respondents [Penn Water and Transmission Company] of a stabilized income" (R., Vol. 16, p. 4953). It was only the Baltimore contract which gave Penn Water a "stabilized income" until 1980, irrespective of the periods of low flow

---

* The dissenting opinion points out (R., Vol. 18, pp. 5404-5) that the critical features of the FPC's orders (discussed in paragraphs (b). (i), (ii) and (iii) below), namely, the rate of return, the jurisdictional findings, and the allocation of cost of service, are based respectively upon the financial security, operations, and entitlements and obligations provided for by the Baltimore contract and the assumed continuance thereof until 1980.

in the Susquehanna River when Penn Water might not be able to generate and sell a normal amount of electricity. Without such long term continuing contractual obligation there was obviously no basis for the low return allowed.

The D. C. majority states (R., Vol. 18, p. 5387) that the FPC had "substantial evidence before it to support its findings" with respect to rate of return, but the central aspect of the "evidence" referred to by the D. C. Circuit (R., Vol. 18, p. 5386) is that Penn Water is "insulated" from any "substantial risk" by the illegal Baltimore contract.

Government counsel concede (Memorandum for the FPC on certiorari in this case (Govt. Memo.) p. 16) that the sole basis of the low rate of return is that "under the arrangements with Consolidated which the FPC directed be continued * * * Penn Water was assured a stabilized income as in the past."

Since the Baltimore contract has been adjudicated illegal there is no obligation whatsoever of Consolidated to Penn Water to continue to take any power at all. For example, notwithstanding the FPC's direction to Penn Water to put this tariff into effect, Consolidated could stop taking power on the FPC prescribed basis at the end of a period of high flow when a large amount of power had been generated and delivered, leaving Penn Water to sell the relatively small amount of power coming from the river in low flow as best it could, and thus to receive much less than the allowed return. The fact is that the FPC order, in fixing the abnormally low rate of return, was clearly based not on operations as FPC counsel like to assert, but on the assumed contractual obligations of Consolidated to take power from Penn Water and pay it a specified return until 1980. From operations, without a contract, there could be no "stabilized income."

(ii) *The FPC held it had jurisdiction over intrastate services on the assumption that the illegal and non-existent contracts would continue.*

The FPC also held that, because the companies were tied together under the illegal Baltimore and Safe Harbor contracts (R., Vol. 16, pp. 4859-60) the services of Penn Water to the three Pennsylvania electric utilities, although rendered by Penn Water entirely within Pennsylvania, were interstate in character and subject to regulation by it.*

Government counsel again concede (Govt. Memo., p. 25) that the finding of the FPC that the Pennsylvania business was interstate was "based on the continuance of the arrangements as to power pooling and the residual-payment type of rate."

Here again the D. C. majority attempted to minimize the effect of the contracts upon the decision of the FPC. But the decision of the D. C. majority is based upon its own assertion (R., Vol. 18, p. 5384) that "Each sale [of Penn Water in Pennsylvania] is in effect a pool sale drawn from the integrated interstate system and hence interstate in nature." The existence of this so-called interstate pool depends upon the illegal contracts tying the companies together under the control of Consolidated and upon the illegal revenue pooling provisions thereof (R., Vol. 16, p. 4860).

The other basis of jurisdiction over Penn Water's sales in Pennsylvania asserted by the FPC (R., Vol. 16, pp. 4860-

---

* Thus, this basis of jurisdiction of the FPC over Penn Water's Pennsylvania business was dependent upon the illegal Safe Harbor as well as the illegal Baltimore contract, the former of which is stated by the FPC itself in its brief in the Fourth Circuit to have been prescribed by it "including the terms which the District Court viewed as in restraint of trade." The asserted basis of FPC jurisdiction is therefore clearly founded on contractual provisions held illegal under the antitrust laws by the Fourth Circuit.

61) was the purchase by Penn Water of energy generated by Consolidated in Maryland for sale to Penn Water's Pennsylvania customers. Such purchases from Consolidated were compelled by the exclusive dealing provisions of the Baltimore contract (e.g. Art. IV, R., Vol. 15, p. 4612) which were held by the Fourth Circuit to be illegal *per se* under Section 3 of the Clayton Act (R., Vol. 18, p. 5351). Without such provisions Penn Water could not be compelled by Consolidated to purchase such supplemental energy outside of Pennsylvania. Obviously, this phase of the FPC orders rests on assumed continued existence of these contractual provisions held illegal by the Fourth Circuit.

(iii) *The allocation of the rate reduction between customers was based upon the alleged "entitlements" of Consolidated provided for under the illegal and non-existent contracts.*

The FPC allocated the reduction among Consolidated and the three Pennsylvania electric utility customers of Penn Water, giving 89% of the reduction to Consolidated (R., Vol. 16, pp. 4980-81), such allocation being determined on the basis of alleged power "entitlements" (R., Vol. 16, pp. 4978-79) of Consolidated under the Baltimore and Safe Harbor contracts and not on the basis of the power actually delivered to Consolidated which was far less. Without the illegal contracts such "entitlements" would be non-existent.* As the dissenting opinion points out (R., Vol. 18, p. 5404) "* * * as a result of that interpretation [of the Baltimore contract] the Commission concluded that

* Obviously, the FPC could not properly order such artificial entitlements contrary to the service which was actually being rendered; and the statement of Consolidated in its brief in opposition to the granting of certiorari (p. 25) that in the absence of the void contracts the entitlements are those provided for by a tariff is simply unfounded.

very substantial sales by Penn Water to others had really been for the account of Consolidated, and allocated the reduction accordingly.

An allocation of cost on a delivered power basis (that is, on actual operations) would have given the Pennsylvania utilities a much greater share of the rate reduction. In this instance again Government counsel concede (Govt. Memo. p. 25) that the finding of the FPC regarding allocation of the rate reduction was "based on the continuance of the arrangements as to power pooling and the residual-payment type of rate."

The allocation to Consolidated by the FPC of the major portion of the reduction in Penn Water's rates also necessitated an underlying determination by the FPC that, because of the existence and continuance of the Safe Harbor contract, the alleged power entitlements of that contract in favor of Consolidated negative any obligation of Safe Harbor to deliver capacity and energy under contracts with the Pennsylvania customers which Safe Harbor had executed jointly with Penn Water with the approval of Consolidated.

Penn Water had made contracts with the three Pennsylvania utility customers and with the Pennsylvania Railroad for delivery of power, all with the approval of Consolidated. Safe Harbor had executed such contracts with PP&L, PE and the Pennsylvania Railroad jointly with Penn Water for such supply of power. The supply of power under these contracts requires the use of Safe Harbor's output as well as that of Penn Water. Nevertheless, based on the assumed existence of Consolidated's "entitlements" under the Safe Harbor contract, the FPC held that Safe Harbor was only a nominal party to the other contracts and that the use of Safe Harbor's power under such other contracts was a diversion of "entitlements" belonging to Consolidated.

Without the Safe Harbor contract there is no basis for this determination by the FPC.*

The D. C. majority (R., Vol. 18, p. 5390) plainly recognized that its affirmance of the allocation of the reduction provided for by the rate orders depended upon its decision that the FPC may exempt the Baltimore and Safe Harbor

---

* The FPC made its determination of excess revenues on its interpretation of the "entitlements" of Consolidated under the Baltimore and Safe Harbor contracts as follows:

As to the Baltimore contract, it did this by considering all the revenues actually received by Penn Water from the Pennsylvania customers for net interchange energy as revenues received by Penn Water from Consolidated. Thus, for example, although the actual operations, as recognized by the FPC opinions, show revenues received by Penn Water from Consolidated of $1,104,951.85 in the test year 1946, the FPC determined that Penn Water received total revenues from Consolidated in that year of $2,386,311 (R., Vol. 16, pp. 4958, 4980). It was only after such improper adjustments that the FPC could order a reduction in revenues from Consolidated of over $1,700,000. The sole basis of this artificial FPC determination of revenues was its interpretation of the Baltimore contract as entitling Consolidated to the residue of Penn Water's energy output after Penn Water's contractual obligation to furnish only *firm* energy (as distinguished from *interchange* energy) to the Pennsylvania customers had been met. Contracts with all the Pennsylvania customers also contained provisions for the furnishing of interchange energy by Penn Water. Absent the Baltimore contract, the FPC's determination of the excess revenues and allocation of the rate reduction is wholly unsupportable.

As to the Safe Harbor contract, the FPC based its allocation of Penn Water's reduction upon the alleged entitlement of Consolidated under the Safe Harbor contract to two-thirds of the output of the Safe Harbor plant. In actual operations, however, only approximately one-third of Safe Harbor's output went to Consolidated. By reason of the contract entitlement the FPC regarded Safe Harbor's capacity and energy supplied in Pennsylvania as being diverted from Consolidated by Penn Water and determined that Consolidated should be credited by Penn Water for such alleged diversion on the basis of Consolidated's relatively higher cost for steam generation of an equal amount of power. This resulted in an improper determination of the cost of Penn Water's services to each of its customers and an over-statement of the alleged excess revenues received by Penn Water from Consolidated. Thus, there is no question but that the allocation of the reduction was dependent upon the Safe Harbor contract. Counsel for Consolidated itself conceded this in argument in the District Court in the Safe Harbor contract case (Ct. Tr. p. 74, April 20, 1951).

contracts from the antitrust laws and accordingly may base its allocation upon the artificial entitlements created thereby rather than upon the actual deliveries of power.

2. The FPC Orders Clearly Required Continuance of or Were Based on Illegal Contractual Arrangements Regardless of Articles IV and V of the Baltimore Contract.

FPC counsel now apparently contend that the FPC's rate orders did not require continuance of Articles IV and V of the Baltimore contract, which expressly conferred upon Consolidated the power to control all contracts by Penn Water for purchase and sale of power and to control Penn Water's expansion or disposition of facilities, and that therefore the FPC prescribed only "lawful" parts, and no unlawful parts, of the contract.*

We have already quoted above passages from the FPC's orders reciting FPC requirements that existing arrangements continue and stating that the FPC was "merely changing the rates". We there showed also how the FPC specifically singled out Articles IV and V for lavish praise and expressly ordered continuance of the exclusive dealing provisions of Article IV, and how the FPC's brief in the Court below stated that the rate schedule which it prescribed for Penn Water "permits Penn Water's facilities to be operated as though they were under common ownership with Baltimore Company's facilities" (Tr. 5574).

* The Fourth Circuit, in declaring the entire Baltimore contract illegal, held (R., Vol. 18, pp. 5358-9) that a part thereof, the prior 1927 Agreement was not reactivated as Consolidated and the Maryland Commission contended. The Court said that the controls over Penn Water given to Consolidated by the Baltimore contract were "closely associated" with the payment provision, pointing out that it was conceded that without the control provisions the 1931 Baltimore contract would have been impracticable and would not have been made. Similarly, in the case of the Safe Harbor contract, the control provisions were characterized by the District Court (Bryan, J., sitting by special designation), whose decision was affirmed by the Fourth Circuit, as the "warp and weft" of the contract (R., Vol. 18, p. 5366).

However, accepting at face value for the sake of argument the FPC's contention that it did not prescribe Articles IV and V but the rest of the contract only, the fact remains that the FPC orders clearly required continuance of arrangements which are illegal *per se* because, as more fully shown below, (a) the antitrust law illegalities are not merely contained in Articles IV and V of the contract but permeate the entire arrangement, (b) the FPC admits having required the contractual method of payment, which is revenue pooling illegal *per se*, and (c) the Penn Water rate orders rest not only on the Baltimore contract but also on the companion Safe Harbor contract (which gave Consolidated controls substantially similar to those in the Baltimore contract) and the FPC admits (Govt. Memo., p. 24, fn. 29) having ordered continuance of the entire Safe Harbor contract, including the provisions thereof adjudged illegal *per se* under the antitrust laws.

(a) The antitrust law illegalities are not merely contained in Articles IV and V of the contract but permeate the entire arrangement.

The entire Baltimore contract (R., Vol. 18, p. 5397) has been adjudged illegal and void. Mere assumed excision of Articles IV and V from the Baltimore contract, as urged by FPC counsel, would by no means cure the FPC's difficulty*.

---

* The Respondents nowhere explain how there is any business reality under their present theory of the situation created by the FPC orders and the Fourth Circuit decisions in the Baltimore contract case. The Penn Water contract, absent Articles IV and V, is not a rational business arrangement (R., Vol. 18, p. 5359). Consolidated itself so asserted in affidavits and briefs submitted to the Fourth Circuit and in its brief to this Court in opposition to certiorari (p. 18). Counsel for the government have conceded (Govt. Memo., p. 23) that the entire agreement was stricken down because its illegal provisions were inseparable parts of a *contract* that could not operate as a *contract* between the parties without these provisions. How could the arrangement operate any better as a *rate schedule* between the parties in the absence of these provisions?

The retreat of FPC counsel to a suggestion that the FPC approved the balance of the arrangement and that such balance was "lawful" will not stand analysis. The basic Baltimore contract of June 1, 1931 contains ten Articles. It is revealing to examine these Articles one by one and then ask just what "lawful" parts FPC counsel has in mind:

Article I provides that the Agreement shall continue in force until April 22, 1980. Under what provision of the Act can the FPC possibly claim the power to issue an order requiring that rates or any other arrangements imposed on a utility "continue in force until April 22, 1980"? What possible justification is there in ordering Penn Water to perform until 1980 without ordering that Consolidated likewise perform?

Article II provides that Consolidated shall be entitled to all of Penn Water's own power and that received by Penn Water under the Safe Harbor contract not disposed of by Penn Water to others under contracts made *with Consolidated's approval.* This Article obviously embodies the admitted illegalities of Article IV of the Baltimore contract and all the adjudicated illegalities of the Safe Harbor contract which the FPC admits it prescribed *in toto.*

Article III provides for the specified return method of payment, which is illegal *per se* as shown in the next subdivision of this brief. Aside from this aspect, the provision in substance reincorporates the illegal features of Article IV of the Baltimore contract in that it effectively prevents Penn Water from selling power to others than Consolidated by removing all incentive on the part of Penn Water to do so because any revenues received from such sales would be credited to Consolidated.

Article IV is the Article requiring Penn Water to obtain Consolidated's approval before entering into any agreement

for purchase, sale or interchange of power, and is the Article under which Consolidated has sought to require termination or revision of Penn Water's contracts with the Pennsylvania customers, claiming the rates charged therein to be too low. It is also the Article which required exclusive dealing as to purchases of power. The FPC has required exclusive dealing by Penn Water with Consolidated to be continued in the FPC orders of February 28 and October 27, 1949.

Article V is the Article requiring Penn Water to obtain Consolidated's approval for plant expansion, or disposition of facilities, and is the Article under which Consolidated forbade Penn Water to build its proposed new steam generating plant using river coal free except for the cost of reclaiming.

Article VI is merely an incidental provision requiring Penn Water to keep its equipment in good condition as far as practicable.

Article VII is an Act-of-God provision to the effect that if any catastrophe should prevent Penn Water from supplying and Consolidated from receiving any part of the power contracted for, their respective obligations to supply and receive shall be suspended for the duration of the catastrophe, with reasonable abatement of payments in favor of Consolidated but without any provision for relieving Penn Water from its obligation under Article III to credit Consolidated with all revenues from other customers or for relieving Penn Water of any of its other obligations under the Baltimore contract.

Article VIII in effect subjects all managerial functions affecting Penn Water (including operating, engineering, accounting and contract matters) to the control of an operating committee with a veto power in Consolidated's commit-

tee representative or President as to all such matters. Under what provision of the Act can the FPC possibly claim authority to order that one company shall have such power and control over another independent company? Obviously this Article embodies essentially the same kind of control provisions as Articles IV and V and in fact was so treated in the Fourth Circuit decisions (R., Vol. 18, pp. 5328-9; Pamphlet Op., p. 7; see also R., Vol. 18, pp. 5366).

Article IX provides that in order to determine the payments to be made by Consolidated under the provisions of Article III (which embodies the illegal specified return provision) Consolidated shall have complete access to and right of audit of Penn Water's accounts. Under what provision of the Act can the FPC possibly claim authority to issue an order giving one company such a right as to another? This is one of the Articles used by Consolidated to facilitate its oppression of Penn Water by withholding of amounts aggregating over $900,000 as of December 1948.

Article X provides that in case of "any dispute" arising under the contract between Penn Water and Consolidated the dispute shall be referred to a board of arbitration, although such arbitration agreements are not even enforceable under Maryland law, the only jurisdiction in which Consolidated can be reached. Under what provision of the Act can the FPC possibly claim a right to include such a provision in a rate order?

The foregoing analysis demonstrates, we submit, that one need do no more than read the ten articles of the 1931 contract to see that the *per se* illegalities pervade every Article (with the possible sole exception of the incidental provision of Article VI that Penn Water's equipment shall be kept in as good condition as practicable) and that the

FPC's argument that its orders prescribed only the "lawful" parts of the contract cannot be supported.

(b) *The FPC admits that it required continuance of the specified return method of payment, which is illegal per se.*

The FPC orders concededly did direct continuance of the specified return method of payment contained in the Baltimore contract. These provisions are in violation of the antitrust laws because they have all the vices of and in effect are provisions for the pooling and division of earnings.* Since they provide that Penn Water shall receive a specified return regardless of the services rendered, and credit Consolidated with revenue from other customers, they stifle the incentive of Penn Water to compete, either with Consolidated or with others, and rob it of any initiative to obtain more customers and effect operating economies.

As pointed out in the preceding subsection of this brief, the payment provision has features of Article IV of the Baltimore contract and a like effect. Because of this Penn Water has no motive to sell power to others than Consolidated since all revenues from such sales will be credited to Consolidated. Penn Water is thus prevented from selling to others as effectively as under Article IV.

In *U. S.* v. *Paramount*, 334 U. S. 131, 149 (1948), this Court held such arrangements for the pooling and division

---

* Respondents claimed in their briefs relating to the petition for certiorari herein that the Fourth Circuit did not hold the revenue pooling arrangement illegal. Actually, the revenue pooling feature is basic to the whole contractual arrangement, and the Fourth Circuit held the arrangement illegal in its entirety. In its first opinion, in the Baltimore contract case, the Fourth Circuit, having found some illegal features of the contract, expressly refrained from going on and passing on other features. But in the Safe Harbor contract case, the Fourth Circuit held that the Safe Harbor contract was illegal for the same reasons as the Baltimore contract and expressly enumerated (Pamphlet Op., pp. 6-7) the revenue pooling Article among the restrictive provisions.

of earnings to be in violation of the antitrust laws stating "Clearer restraints of trade are difficult to imagine."*

The stifling of incentive is even more pronounced in the Penn Water arrangement than in the type of arrangement involved in most of the cases, under which two companies share in arbitrary proportions, unrelated to services, the total earnings of both. In the latter situation, although incentive is diminished it is not completely eliminated, because if either company can increase the total joint earnings by getting new business or increasing its efficiency, it will at least share in the increased earnings to the extent of its arbitrary proportion. In the Penn Water arrangement, however, Penn Water's incentive is completely removed because 100% of the benefit of any increase in Penn Water's business or efficiency goes to Consolidated, and none of the burden of inefficiency or increased expense falls on Penn Water. In fact the arrangement may result in a credit rather than a charge to Consolidated in any year as pointed out in the Statement.

---

* Such arrangements were also held illegal in *U. S.* v. *Reading Co.*, 253 U. S. 26, 48 (1920); *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 327-328 (1904); *Norfolk Southern Bus Corp.* v. *Va. Dare Transp. Co.*, 159 F. 2d 306, 309-10 (4th Cir. 1947); *Lee Line Steamers, Inc.* v. *Memphis, Helena & Rosedale Packet Co.*, 277 Fed. 5, 8 (6th Cir. 1922); *Chicago, M. & St. P. R. Co.* v. *Wabash, St. L. & P. R. Co.*, 61 Fed. 993, 997 (8th Cir. 1894).

In this last case the court said at p. 997 "The Contract removed every incentive to the companies to afford the public proper facilities, and to carry at reasonable rates; for, under its provisions, a company is entitled to its full percentage of gross earnings, even though it does not carry a pound of freight."

The fact that the rates and services of the parties to a revenue pooling arrangement are regulated does not eliminate its illegality under the antitrust laws any more than it eliminates the illegality of other restraints of trade. In both the *Reading* and *Norfolk Southern Bus* cases the parties to the revenue pooling arrangement condemned under the antitrust laws were utilities whose rates were regulated.

The illegality of the arrangement is not lessened by the fact that incentive was removed only as to the suppressed company, Penn Water, and not as to the suppressor, Consolidated. The elimination of competition on the part of one of the two parties is sufficient to eliminate competition between them completely.*

Even where, by special statutory provision, the unit rates are permitted to be combined with a maximum rate-of-return factor, care is taken to avoid removal of the incentive for increased efficiency and economy by permitting the utility to keep a share of any earnings in excess of the specified rate of return.**

As in the case of other types of agreements in restraint of trade, where Congress has desired to permit agreements for the pooling and division of earnings to be exempted by a regulatory body from the antitrust laws, it has specifically so provided, under carefully defined conditions and safe-

---

* The FPC has conceded that this type of payment provision removes incentive to compete. In its brief submitted to the Fourth Circuit in October, 1951 in connection with its petition for intervention in the suit regarding the invalidity of the Safe Harbor contract, the FPC stated (p. 14) that the payment provision (which is in effect the same as that in the Baltimore contract) prevents "setting up an economic interest upon his [Safe Harbor's] part," and argued (pp. 33-34) that the restrictions on Safe Harbor were valid because, due to the payment plan, "its interests are not adversely affected" by the manner in which it is operated.

** For example, Potomac Electric Power Company, under such a special statute, agreed with the Public Utilities Commission of the District of Columbia that if its unit rates in any year should yield more than a 7½% return on the value of its property, it would reduce its unit rates for the following year by an amount equal to one-half of such excess, retaining the other half. See *Potomac Electric Power Co.* v. *Public Utilities Commission*, 158 F. 2d 521 (1946). Under this type of arrangement, the utility retains its incentive to get new business and effect economies, since it can keep all the benefits thereof in the current year and a share of such benefits even in the following year.

guards.* There is no such provision in the Federal Power Act. These provisions of other acts clearly indicate the distinction made by Congress between ordinary provisions for the regulation of rates and special provisions relating to revenue pooling.

Regulation of rates (i.e., the amount to be charged) upon the basis of a return found reasonable, does not, as do the revenue pooling arrangements of the Baltimore contract, insure the receipt of such return irrespective of whether or not the utility renders adequate service or loses business through a policy of non-competition.** The specified return provisions of the Baltimore contract provide for payment even if no power at all is delivered.

The contention that a Federal regulatory agency may, pursuant to its authority to regulate rates, insure that a specified return will be received (or, in other words, regulate on the basis of a cost-plus subsidy plan) has been rejected by the Civil Aeronautics Board under the Civil Aeronautics Act. *Pennsylvania-Central Airlines Corp., et al., Motions,* 8 C. A. B. 685, 696 (1947). That Act, moreover, unlike the Federal Power Act, specifically authorizes the

---

* See, for example, Section 5(1) and (11), Interstate Commerce Act (49 U. S. C. §5(1) and (11)); Section 15, Shipping Act (46 U. S. C. §814); Sections 412(a) and 414, Civil Aeronautics Act (49 U. S. C. §§492(a) and 494). The Interstate Commerce Commission which, as pointed out above, has the express authority to exempt pooling arrangements from the antitrust laws, has stated in a recent decision:

> "The object of pooling arrangements is ordinarily the restraint of competition, the statute directing that we find, in approving the arrangement, that such restraint shall not be undue." *Application of Pullman Co. under Sec. 5(1), Interstate Commerce Act,* 259 I. C. C. 41, 43-5 (1944).

** "A rate established as reasonable, whether by the company or the commission, is not guaranteed by the commission or the public. Whether it will actually yield more or less than a fair return during its continuance is a risk of the business." *Georgia Ry. v. R. R. Comm.,* 278 Fed. 242, 247 (N. D. Ga. 1922), aff'd. 262 U. S. 625 (1923).

Board to exempt arrangements for the pooling and division of earnings from the antitrust laws (49 U. S. C. §§492, 494). *The Pennsylvania-Central* decision was affirmed by this Court in *T. W. A. v. C. A. B.*, 336 U. S. 601 (1949) which held that the normal method of rate regulation by prescribing the *amount* to be charged "forces carriers within a given class to compete in securing revenue and in reducing or controlling costs" (pp. 606-7).*

Thus, the courts, in striking down in the above cited cases revenue pooling arrangements analogous to that provided in the Baltimore contract (except where such arrangements have been specifically authorized with appropriate safeguards by Congress), have in no way interfered with the normal rate-making process. The FPC departed from the normal and customary rate making process when it prescribed the specified return method of payment.

(c) The FPC admits that it required continuance of the entire Safe Harbor contract, which is also a foundation of the Penn Water rate orders.

The FPC itself characterized the Safe Harbor contract (along with the Baltimore contract) as one of the "foundation contracts" underlying the Penn Water rate orders. The characterization was entirely justified because the Penn Water rate orders in numerous respects (most notably in connection with the FPC's asserted jurisdiction over Penn

---

* See also *United-Western, Acquisition Air Carrier Property*, 8 CAB 298, 321 (1947), in which the CAB stated: "the established policy of this Board * * * recognizes that differences in the return may accrue to different carriers operating under the same rates and * * * permits management to retain the profits of its economies as an incentive toward the accomplishment of decreased costs and increased revenues. The incentive which the Board's rate policy holds out to air carriers to profit from economies which produce a better-than-average return upon investment itself invalidates the assumption that the rate-making process is an instrument of precision which produces a mathematically precise rate of return." To the same effect see *FPC v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 590 (1942).

Water's Pennsylvania business [See Section C 1(b)(ii) of this Point], determinations of cost of services to and determinations of revenues received from the various customers and the cost allocation under which the major share of the rate reduction is given to Consolidated [See Section C 1(b)(iii) of this Point], were predicated upon the fictitious "entitlements" (R., Vol. 16, pp. 4978-9) provided for in the Safe Harbor contract rather than upon actual operations and power actually supplied.

The Safe Harbor contract has been adjudged illegal *per se* and void in its entirety on the same grounds as the Baltimore contract.

The FPC conceded in its October, 1951 brief in the Fourth Circuit case (referred to in Govt. Memo., p. 34) that "the Commission's order prescribed the June, 1931 [Safe Harbor] contract, as supplemented, including the terms which the District Court viewed as in restraint of trade."

II. The FPC has no authority to direct continuance of or base its orders on contractual arrangements of a state utility corporation adjudged illegal under the laws of its state of incorporation.

The D. C. majority ignored completely that the antitrust laws were not the only basis of the *per se* illegalities of the Baltimore and Safe Harbor contracts. As adjudged by the Fourth Circuit, the contracts were illegal and void on their face for the separate and independent reason that they violated the fundamental laws of the State of incorporation of Penn Water and Safe Harbor, namely, (a) the statutes of Pennsylvania governing Pennsylvania corporations,* (b)

---

* "The business of every corporation created hereunder, or accepting the same, shall be managed and conducted by a president, a board of directors * * *". (Section 5, Corporation Act of 1874). The substance of this statute was incorporated in the Penn Water and Safe Harbor by-laws.

the doctrine of *ultra vires* as laid down by the courts in Pennsylvania and elsewhere,* (c) the Pennsylvania statutes governing Pennsylvania utility corporations,** and (d) common law and public policy.***

---

* Decisions holding contracts which deprive corporate directors of management powers to be *ultra vires* and void are: *Dubbs* v. *Kramer*, 302 Pa. 455, 153 Atl. 733, 734 (1931); *Severance* v. *Heyl & Patterson, Inc.*, 123 Pa. Super. 553, 187 Atl. 53, 58 (1936); *Sherman & Ellis* v. *Indiana Mutual Casualty Co.*, 41 F. 2d 588 (7th Cir. 1930), cert. den. 282 U. S. 893; *Rosenthal* v. *Light*, 185 App. Div. 702, 173 N. Y. S. 743 (1919); *Smith* v. *California Thorn Cordage, Inc.*, 129 Cal. App. 93, 18 P. 2d 393 (1933); *Long Park, Inc.* v. *Trenton-New Brunswick Theatres Co.*, 297 N. Y. 174, 77 N. E. 2d 633 (1948).

** "It shall be the duty of every public service company—

"(a) To furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate, and practically sufficient for the accommodation and safety of its patrons, employes, and the public, and in conformity with such reasonable regulations or orders, as may be made by the commission." (Article II, Section 1, Pennsylvania Public Service Company Law of 1913.)

"Upon like approval of the commission first had and obtained, as aforesaid, and upon compliance with existing laws, *and not otherwise*, it shall be lawful—* * *

"(c) For any public service company to sell, assign, transfer, lease, consolidate, or merge its property, powers, franchises, or privileges, or any of them, to or with any other corporation or person." (Article III, Section 3, Pennsylvania Public Service Company Law of 1913.)

Such provisions were reenacted with the same purport in Pennsylvania Public Utility Law, May 28, 1937.

For full text of Pennsylvania statutes see Appendix to Brief of Pennsylvania Commission in Case No. 429.

*** *Gibbs* v. *Consolidated Gas Company of Baltimore*, 130 U. S. 396, 410-411 (1889); *Chicago, M. & St. P. R. Co.* v. *Wabash, St. L. & P. R. Co.*, 61 Fed. 993, 997 (8th Cir. 1894); *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 48, 51 (1891); *The New York and Maryland Line R. Co.* v. *Winans*, 17 How. 30 (U. S. 1854); *U. S. Tel. Co.* v. *Central Union Tel. Co.*, 202 Fed. 66, 72-73 (6th Cir. 1913), cert. den. 229 U. S. 620; *Union Trust & Savings Bank* v. *Kinloch Long-Distance Tel. Co.*, 258 Ill. 202, 101 N. E. 535, 537-38 (1913); *State* v. *The Hartford and New Haven R. Co.*, 29 Conn. 538 (1861); *Chicago Gas-Light & Coke Co.* v. *People's Gas-Light & Coke Co.*, 121 Ill. 530, 13 N. E. 169, 172-173 (1887); *Coombs* v. *Burk*, 40 Cal. App. 8, 180 Pac. 59 (1919). See also 7 Fletcher, Cyc. of Corporations §3592 (Perm. Ed. 1931).

The same contractual provisions for restrictive controls in Consolidated and revenue pooling which made the contracts illegal *per se* under the antitrust laws, as discussed in Point I above, also made them illegal under Pennsylvania laws. The contracts violated these state laws by depriving Penn Water and Safe Harbor of their initiative as to rates and services, and by taking managerial control away from their boards of directors and giving it to another corporation, Consolidated, a Maryland corporation and a competitor.

Thus, the illegalities were not mere violations of regulations of Pennsylvania or its Commission. They were not in the field of regulation at all but represented violation of the fundamental law of the sovereign which created the corporations.

There is nothing in the Act which even purports to give the FPC authority to order or condone contractual arrangements violative of such state laws. On the contrary, the wording of the Act and its legislative history indicate that even in the field of regulation Congress did not intend to take from the states any functions theretofore exercised, but only to supplement the authority of states where necessary to regulate matters in the area of interstate commerce which were beyond the reach of the states.

Where Congress has intended to permit a Federal regulatory body to modify the powers of a state corporation in some respects it has specifically so provided; Interstate Commerce Act, Section 5(11) and 20b(5) (49 U. S. C. §§5(11), 20b(5); Section 213 of the Motor Carrier Act of 1935 (49 Stat. 557)).* No such provisions are to be found

* For example, Section 5(11) of the Interstate Commerce Act provides in part: "* * * and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the opera-

in the Federal Power Act. The Act does not even contain a general provision exempting transactions approved by the FPC from other laws such as is contained in the Federal Communications Act with respect to mergers of telegraph companies (47 U. S. C. §222(c)(1)).* See also Section 414 of the Civil Aeronautics Act, 49 U. S. C. §494.

That, by enactment of the Act and the granting of licenses thereunder, Congress did not intend to alter the powers of state corporations or give them powers which they do not have under their organic state laws, is shown by Section 9(b) which requires as a condition of obtaining a license that the applicant corporation must show that it has complied with the laws of the state in which the project is located and has the right under state law to engage in the business of developing the project.

Respondents can point to no provision in the Act indicating any intention to deprive a corporation of its initiative as to reasonable rates and adequate services, which is "one of the most important duties of a public utility, inherent in its franchise to serve the public", as the Fourth Circuit held in the Baltimore contract case (R., Vol. 18, p.

---

tion of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

---

* The Section provides in part: "* * * the Commission shall enter an order approving and authorizing such consolidation or merger, and thereupon any law or laws making consolidations and mergers unlawful shall not apply to the proposed consolidation or merger."

5347). Even the D. C. majority concedes that freedom of exercise by public utility companies of "their private initiative in promulgating rates, services and changes therein * * * is an important condition precedent to proper operation of the rate-making process" (R., Vol. 18, p. 5374). The respondents cannot point to any provision of the Act giving the FPC authority to permit a corporation to perform acts which are *ultra vires* or in contravention of the corporate statutes or common law, and public policy of the state of incorporation.

There is no general inconsistency between these Pennsylvania laws and the Act. Obviously, the FPC, to whatever extent it has jurisdiction, can regulate the rates to be charged and the services to be rendered by Penn Water without in effect ordering Penn Water to violate the organic laws of its state of creation by permitting Consolidated to veto its managerial decisions, suppress its competitive activities and stifle its incentive for growth, through provisions for revenue pooling, operating committee vetoes, and other restrictive controls. The FPC need only permit Penn Water to have an arrangement with Consolidated of the usual unit rate type, without managerial controls, as is elsewhere found in the industry. This Court has held that state law is superseded by a Federal law "only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'." *Kelly* v. *Washington,* 302 U. S. 1, 10 (1937); *Hines* v. *Davidowitz,* 312 U. S. 52 (1941).*

---

* Even where a Federal agency charged with the regulating of certain phases of interstate commerce has express authority to override state law, such authority may be exercised only where necessary to perform the functions assigned to it by Congress. *Florida* v. *U. S.,* 282 U. S. 194, 211-12 (1931); *Yonkers* v. *U. S.,* 320 U. S. 685, 690 (1944); *American Express Co.* v. *Caldwell,* 244 U. S. 617, 625 (1917); *North Carolina* v. *U. S.,* 325 U. S. 507, 511 (1945); *State of Texas* v. *U. S.,* 84 F. Supp. 791, 793 (W. D. Okla., 1949).

This Court has frequently held that an intention by Congress to preclude a state from exercising its traditional powers must be clear and manifest. See *International Union, U. A. W.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 253 (1949); *Davies Whse. Co.* v. *Bowles*, 321 U. S. 144, 152 (1944); *California* v. *Zook*, 336 U. S. 725, 733 (1949), and cases cited.

But Congressional intent has been expressed to the contrary here. Even in the field of regulation as distinguished from fundamental state law, Part II of the Act, under which the FPC claims authority to continue arrangements illegal under state laws, provides in Section 201(a):

> "* * * such Federal regulation [under Parts II and III], however, to extend only to those matters which are not subject to regulation by the States." (Matter in brackets added.)

Furthermore, as more fully discussed in Point III below, the legislative history of Part II indicates that Congress intended to give the FPC only such powers as were beyond the reach of the states under the decision of this Court in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 84 (1927).*

Even under specific provisions for overriding other laws, such as are contained in the Interstate Commerce Act and Federal Communications Act, there would be no authority to require a state corporation to continue an arrangement such as the Baltimore contract which destroys the inherent nature of the corporation in violation of the laws of the state of incorporation. An attempt to grant

* Hearings on H. R. 5423 before the House of Representatives Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. Pt. 1, p. 384, quoted in *Connecticut Light & Power Co.* v. *FPC*, 324 U. S. 515, 525 (1945) and *Jersey Central Power & Light Co.* v. *FPC*, 129 F. 2d 183, 193 (3d Cir. 1942).

such authority would be an unconstitutional invasion of the rights reserved to the states under the Tenth Amendment.

In *Chicago Title & Trust Co.* v. *41-36 Wilcox Building Corp.*, 302 U. S. 120 (1937) this Court held that even Congress pursuant to its bankruptcy power could not breathe life into a corporation which had been dissolved under the law of its state of incorporation. In holding that a corporation which had been dissolved under the state law could not file a voluntary petition in bankruptcy, this Court stated (pp. 127-128):

> "How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305, 312-313; *Ashley* v. *Ryan,* 153 U. S. 436, 441, 443; *New Jersey* v. *Anderson,* 203 U. S. 483, 493. The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority."

In *Hopkins Federal Savings & Loan Ass'n.* v. *Cleary,* 296 U. S. 315 (1935), this Court held that an attempt by Congress to convert a state building and loan association into a Federal corporation contrary to the law of the state of incorporation was unconstitutional under the Tenth Amendment.

It would have violated Section 1 of Article I of the Constitution and the Fifth Amendment had Congress attempted

to give the FPC authority to take from Penn Water its corporate powers and vest those powers in a foreign competitor corporation. In *Carter* v. *Carter Coal Co.,* 298 U. S. 238 (1936) this Court held that a delegation under the Bituminous Coal Conservation Act of 1935 to less than all the producers of coal and employers of mine workers of the power to fix the wages to be paid by all the producers and employers was unconstitutional and said:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. * * * The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, *in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor.* And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the questions. *Schechter Corp.* v. *United States,* 295 U. S. at p. 537; *Eubank* v. *Richmond,* 226 U. S. 137, 143; *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, 121-122" (pp. 311-312).

In any event there is no indication anywhere in the Federal Power Act that it was intended to permit the FPC to require electric utilities to perform contractual arrange-

ments depriving them of their independence and initiative with respect to rates and services or to perform *ultra vires* acts in violation of the laws of the sovereign creating them.

III. A licensee subject to regulation under Part I of the Act is not also subject to the different regulatory provisions of Part II.

The Federal Water Power Act of 1920 (now Part I of the Federal Power Act) was designed primarily to encourage the development of the hydroelectric resources of the United States. By that act a system of regulation, primarily by the states concerned, was established for persons licensed to develop hydroelectric power on navigable streams. The Water Power Act provided for various special rights to be enjoyed and obligations to be performed by licensees, and protected the licensee against any unilateral change in his license contract by providing (Sections 6 and 28) that no license could be altered without the licensee's consent and that no amendment of that Act should affect the rights of any licensee thereunder.

Parts II and III of the Federal Power Act were enacted in 1935 (at which time the 1920 Act with certain changes was reenacted as Part I). Part II was enacted primarily for the purpose of subjecting to Federal regulation public utilities other than licensees which had been held by this Court* not to be subject to regulation by the states as regards wholesale rates in interstate commerce and which were therefore free from any regulation, state or Federal, as to such rates.

The structure and language of the Act and the contractual nature of licenses issued under Part I, as well as its

---

* *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, 273 U. S. 84 (1927).

legislative history, show that Congress did not intend to subject to regulation under Part II licensees which were already subject to regulation under the different regulatory system of Part I. Furthermore, in view of the provisions of Section 201(a) of the Act, namely, "such Federal regulation [Parts II and III], however to extend only to those matters which are not subject to regulation by the States," it is clear that it was not intended that Part II should interfere in any respect with existing regulatory powers of the states provided for in Sections 19 and 20 of Part I.

A. The Language of the Act.

The D. C. majority held that by enactment of Part II of the Act Congress intended to repeal provisions of Part I of the Act, although Congress simultaneously reenacted Part I* (R., Vol. 18, p. 5381).

That this is not a reasonable construction of the Act, and that the only reasonable construction is that Part II is not applicable to licensees subject to regulation under Part I, is plain from the wording of the Act.

Under Section 20 of Part I licensees rendering electric services in interstate commerce are subject to regulation by the states concerned, unless one of the states does not have a regulatory authority or the regulatory authorities of the

* This holding was basic to the holding of the D. C. majority that Section 10(h) of Part I restating the antitrust laws had been impliedly repealed by Part II. If Part II is not applicable to licensees under Part I, then the holding of the D. C. majority as to Section 10(h) falls completely. However, as stated in Point I, even if Part II should be held applicable to licensees there would still be no sound ground for holding Section 10(h) to have been impliedly repealed because of the absence of any inconsistency between any provision of Part II and the provisions of Section 10(h).

states are unable to agree. This is the same regulatory authority which the states possessed up to 1935 under the corresponding section of the Federal Water Power Act of 1920.

Part II expressly provides that the FPC shall have jurisdiction to regulate interstate rates of a "public utility". Thus, if a licensee under Part I were also a public utility within the meaning of Part II, it would be subject to dual regulation and there would be an irreconcilable conflict between the two Parts. But no sensible legislative body would enact in the same bill such a patent inconsistency without specifically resolving it. Congress did preclude any inconsistency when it provided that Federal regulation under Parts II and III of the Act was "to extend only to those matters which are not subject to regulation by the states" (Section 201(a)). Bearing in mind that the states for fifteen years had had authority to regulate the rates of licensees as specified in Section 20 of Part I, how could Congress have made it more plain that the regulation provided for in Part II was not to apply to such licensees?

This construction of the two parts of the Act conforms to the cardinal principle of statutory construction that all parts of an act shall be given effect where possible. The construction urged by the FPC and the D. C. majority does not conform to that principle of construction.

Similarly, the decision of the Third Circuit in *Safe Harbor Water Power Corporation* v. *F. P. C.*, 179 F. 2d 179 (1949), cert. den. 339 U. S. 957, does not conform to that principle. That decision left unsolved the inconsistency between Section 20 of Part I and the provisions of Part II, by saying in effect that it did not need to solve the inconsistency because at that time the states concerned were

unable to agree, so that at that moment the FPC had jurisdiction under both Section 20 of Part I and the provisions of Part II. However, such an accident of a special situation cannot be a guide to the construction of a statute intended to have general application to a whole industry in many states throughout the country.

In a prior case involving FPC jurisdiction over rates of Safe Harbor, in which the Third Circuit set aside FPC orders as beyond the FPC's jurisdiction, the Court said:

> "We conclude that it was the intention of Congress to regulate hydroelectric power by state commissions using the federal Agency set up in Section 20 only where the state commissions did not or could not perform the function expected of them."*

In the second *Safe Harbor* case the Third Circuit conceded that its first *Safe Harbor* decision had "squinted" toward the construction that Part II was not applicable to licensees under Part I (179 F. 2d, at p. 188). It also expressly refused to accept an argument that Part II, simultaneously enacted with reenactment of Part I, repealed Part I (179 F. 2d at p. 186).

Another inconsistency between Parts I and II arises with respect to rate base. It is clear from the legislative history that under Part I net investment was intended to be the rate base used for establishing rates for licensees. Section 3(13) of Part I defines** net investment to provide in effect for an undepreciated rate base except where depre-

---

* *Safe Harbor Water Power Corporation* v. *F. P. C.*, 124 F. 2d 800, 806 (1941), cert. den. 316 U. S. 663 (1942).

** In order to encourage private investment it was essential that the terms which might affect the investment of licensees be certain; and therefore a definition of net investment was provided.

ciation and other reserves are accumulated from earnings in excess of a fair return.*

Under Part II the rate base is left to the FPC to determine, and it has here prescribed a depreciated rate base under Part II rather than the net investment rate base under Part I.**

Thus it cannot be denied that there are substantial and material conflicts and inconsistencies between Parts I and II of the Act. All of these are eliminated by the self-evident construction of the Act that Part I applies to licensees and Part II applies to "public utilities" engaged in interstate commerce other than licensees. Such a construction preserves the basic intent of Congress in its enactment of the Act not to curtail state jurisdiction. It also avoids the

---

* In this connection the Secretary of Agriculture, Houston, recommended using net investment only rather than net investment or fair value and said in testifying before the Committee on Water Power of the House of Representatives, 65th Congress, 2nd Session (p. 701):

> "'Net investment' would furnish a certain basis for the Commission in *establishing rates,* which the 'fair value' does not."

Mr. Esch, one of the sponsors and draftsmen of the bill during the debate on the conference report (Cong. Rec., 65 Cong., 3d Sess., Vol. 57, Part V, p. 4638) said:

> "Another change made by the conferees was in reference to the basis for rate making. In the House bill the *basis for rate making* was practically the net investment, but there was some doubt expressed by the Senate conferees that the terms used would not authorize the commission to allow to the licensee the cost for the construction of locks, aids to navigation, or other capital expenditures."

** In view of the above discussed conflicts and inconsistencies between Part I and Part II, the D. C. majority is clearly incorrect when it states (R., Vol. 18, p. 5381) that

> "The *only problem* suggested to us which may arise from such a construction is that, in the event of recapture by the United States of the site awarded to a licensee, which is also a public utility, payment would have to be made pursuant to the valuation formula contained in Part I, which is said to differ from that used for rate-making in Part II."

undesirable necessity of invoking the principle of implied repeal. As this Court said in *United States* v. *Jackson,* 302 U. S. 628 (1938) at p. 631:

> "Repeals by implication are not favored. A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can be applied."

Here the construction of only one statute is in issue rather than the reconciliation of two conflicting laws enacted at different times.

Throughout the Act the careful and discriminating use of the words "licensees" and "public utilities" emphasizes and demonstrates the differentiation between licensees and public utilities. Throughout Part I the term "licensee" is used, throughout Part II the term "public utility" is used and throughout Part III (the procedural and administrative Part) terms expressly applying to both, such as "every licensee and public utility" are used. The words "Part" and "Act" are also carefully and discriminatingly used throughout the Act to indicate the separate applicability of Parts I and II to licensees and public utilities, respectively, and the joint applicability of Part III (the procedural and administrative Part) to both licensees and public utilities.

This construction of the Act was the one naturally adopted by the Second Circuit in *Niagara Falls Power Co.* v. *Federal Power Commission,* 137 F. 2d 787, 795 (2nd Cir. 1943), cert. den. 320 U. S. 792, and by another panel of the D. C. Circuit in *Alabama Power Co.* v. *Federal Power Commission,* 128 F. 2d 280, 293 (D. C. Cir. 1942), cert. den. 317 U. S. 652, cases in which the courts stated that Part II did not apply to licensees. In the first of these cases, involving a determination of original cost of the utility's properties, the Court said (p. 795):

> "When Congress in 1935 added Part II to the statute, 16 U. S. C. A. §824 *et seq.* which relates principally to rates of public utilities engaged in interstate commerce, *other than licensees* under Part I, it provided * * * ".

In the second of these cases, in which the Court was reviewing a determination by the FPC of the total cost of a licensed hydroelectric project, the Court pointed out (p. 293) that the FPC

> "in making valuations for purposes of rate regulation of public utilities—*not its licensees*—is governed, also, by a different formula than when it makes valuations of the property of a licensee. The formula for valuation of *properties of licensees,* for rate making purposes is contained in the provisions of sections of the 1920 Act which were incorporated into *Part I* of the Federal Power Act of 1935. *Part II* of the Power Act is that which deals with *public utilities* subject to the control of the Federal Power Commission, by reason of being engaged in distribution of electric power in interstate commerce." *

Such is the plain and simple explanation of the provisions of the Act and there is no conflict between Part I and Part II on such basis. It was only years after the enactment of the Act, when the FPC attempted to extend its jurisdiction under Part II to cover licensees, that an *FPC-*

* The D. C. majority attempts to minimize these cases saying that neither one of them is "a rate case" and "Neither involved Part II and the possibility of conflict between Parts I and II was not discussed" (R., Vol. 18, pp. 5379-80). Both cases, however, deal with the determination of the "actual legitimate original cost" of a licensee's project property which is basic to any determination of the reasonableness of a licensee's rates under Part I. Moreover, Part II is discussed in both cases, as well as Part I, and both Courts correctly found no conflict between Parts I and II since they state Part I applies to licensees and Part II applies to public utilities which are not licensees.

created conflict arose. Congress never created any conflict since it had no thought of taking away any jurisdiction from the States and never intended that the provisions of Part II would apply to licensees that were already regulated under the provisions of Part I.

B. The Contractual Nature of a License Issued under Part I.

The Federal Water Power Act of 1920 was intended as an incentive to the development of national water power resources by private capital. It was recognized that private investors had theretofore been reluctant to risk their funds in water power developments primarily because of legal uncertainties. To eliminate these uncertainties Congress provided that investors could enter into license contracts with the United States, acting through the FPC, which contracts should include *all* the conditions, liabilities and responsibilities of the licensee, vis-a-vis the Government, during the license term.

This contractual relationship between licensees and the Government provided for governmental regulation of a unique character. The reason and purpose for this unique regulation was the unique status of licensees, as contrasted with ordinary utility companies engaged in the production or distribution of electric services. In return for the contractual benefits available to licensees, including the right to a specified and defined method of rate regulation, licensees had to assume unique burdens not incidental to ordinary regulation. The ordinary public utility, for example, is not subject, as is a licensee, to recapture of its property (Section 14), is not required to provide navigation facilities (Section 11), is not required to pay administrative charges (Section 10(e)), nor is it subject to expropriation of earnings (Section 10(e)) or to the crea-

tion and maintenance of amortization reserves (Section 10(d)). All such unusual provisions, however, were consistent with the purpose of the act, to promote hydroelectric development by offering terms that would be fair to the investor and protect the interests of the Government.

The Federal Water Power Act also contained a unified financial set up for licensees by harmonizing the provisions for rate fixing with those for amortization and in turn with those for determining the price of recapture of licensed projects by the Federal Government.

It was recognized that a definitive agreement as to just what system of regulation would apply, and under what circumstances, would be of paramount importance to prospective investors in a licensed project. In consequence, it was provided in Sections 19 and 20 of the Water Power Act that the FPC should have regulatory jurisdiction over intrastate rates of licensees only in the event the state in which the operations were conducted had no regulatory body, and should have regulatory jurisdiction over interstate rates of licensees only in the event that the states concerned had not provided any regulatory body or were unable to agree upon such rates.

It was furthermore the intent of Congress that the unique status of licensees should be preserved and maintained. For this reason it was provided in Section 6 that licenses might be altered only upon mutual agreement between the licensee and the FPC and in Section 28 that no amendment to the Act should affect any license theretofore issued.

Significantly, when the national policy with respect to the rendering of hydroelectric services was re-examined in 1935 at the time of the re-enactment of the Water Power Act as Part I of the Federal Power Act, the contractual status of licensees was left intact.

Part II, on the other hand, is a typical regulatory statute for ordinary electric utility companies engaged in interstate wholesale sales of electric energy without any of the special provisions contained in the Water Power Act or Part I for licensees.

The suggestion that, with the enactment of Part II, Congress intended to eliminate the entire statutory purpose of Part I, by making licensees who might engage in interstate commerce also subject to regulation by the FPC as an ordinary incident of government control, and not exclusively and uniquely by *contract*, is wholly inconsistent with the re-enactment of Part I.

Moreover, by statutory contract no amendment could be made by the United States in license contracts, irrespective of whether such change was by legislation or by FPC action, without the consent of the licensee. Thus license contracts could not have been amended by Congress in 1935 to subject the licensee to FPC regulation rather than regulation by the states as to its interstate wholesale rates. For the D. C. majority to argue that Congress intended by the enactment of Part II to subject licensees to the provisions thereof is in effect to argue that Congress intended to impair the obligation of the license contracts already in existence between the Government and licensees. Obviously Congress never had any such intent. Any such attempt was forbidden by Congress itself in Sections 6 and 28 of the Water Power Act. It might well be unconstitutional under the Fifth Amendment to the Constitution.*

* Respondents' argument that in this case there could not have been any impairment of the license contract of Penn Water since it did not formally enter into a license contract with the Government until 1951, is beside the point. It is inconceivable that Congress intended without saying so to have Part II applicable to certain companies which obtained licenses after 1935 but not to other companies which obtained them before that date. Thus the questions to be determined are (a) whether or not Part II at the time of its adop-

C. The Legislative History.

The Congressional intent is borne out by the reiteration throughout the Congressional hearings on the Act that the jurisdiction of the States was not to be supplanted or curtailed in any respect by the Act. If licensees were subject to Part II of the Act and that Part repealed by implication Part I, as Respondents contend, jurisdiction of interstate wholesale rates of licensees would have been taken from the states involved and given to the FPC.

When the Public Utility Bill (H. R. 5423) which became the Federal Power Act was first introduced, Hon. Clyde L. Seavey, a member of the FPC, stated to the House Committee on Interstate and Foreign Commerce (74th Cong., 1st Sess., hearing on H. R. 5423 (p. 384)):

> "The new title II of the act is designed to secure coordination on a regional scale of the Nation's power resources and *to fill the gap in the present State regulation of electric utilities. It is conceived entirely as a supplement to, and not a substitute for State regulation.*"

In the report of the Committee on Interstate Commerce, submitted to the Senate by Senator Wheeler (see S. Report No. 621, 74th Congress, 1st Sess., p. 18) it is stated with respect to that Committee's revision of the original bill:

> "* * * *The revision has also removed every encroachment upon the authority of the States.* The revised

tion was applicable to interstate wholesale sales by all licensees irrespective of whether or not they had prior thereto taken out licenses and (b) whether or not Part II repealed by implication the provisions of Part I in those respects in which Part II is inconsistent with Part I. The determination of these questions does not depend upon the result in any particular case arising years later, but has to be determined by the intent of Congress when, in 1935, it enacted Part II of the Act at the same time it reenacted the comprehensive contractual system for licensees which had already been in effect for 15 years and under which many license contracts for hydroelectric projects had already been entered into between the Government and licensees.

bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters . . . ."

This same Senate Report (p. 48), when referring to the declarations of legislative policy contained in Sections 201(a) and (b) of Part II of the Act, said:

> "Subsection (a) * * * *declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States* and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission."*

In the course of hearings in which the purpose and effect of the three Parts of the Act were outlined for the Committee on Interstate and Foreign Commerce of the House of Representatives, 74th Cong., 1st Sess., on H. R. 5423, Commissioner Clyde L. Seavey of the FPC, commented upon such amendments, and made it clear that only Part III applied to *all* companies subject to FPC regulation (p. 389) saying:

> "The grants of authority in the present subsections (f), (g) and (h) to prescribe accounts, require reports, and make rules and regulations are removed from section 4 and placed in title III of the amended

* Additional similar statements are found throughout the hearings and Congressional Reports by all FPC witnesses, including FPC Solicitor Dozier DeVane (See for example the Hearings before the House Committee pp. 518, 529, 547-548), and by Members of Congress, including Mr. Rayburn, Chairman of the House Committee considering the bill (See for example his Report No. 1318, House of Representatives, 74th Congress, 1st Sess., p. 8).

Power Act, *where they relate to all companies subject to regulation by the Commission.*"

Commissioner Seavey also made it clear that Part II only covered interstate electric utilities, not licensees, when he told the Committee, in presenting a prepared analysis of the Bill (p. 384):

> "The present analysis is devoted to the new titles which are added by the bill. * * * *Of these new provisions title II * * * contains the substantive provisions for the regulation of interstate electric utilities, and title III * * * brings together the provisions applicable to both water power licensees under title I and interstate operating companies under title II, including the general administrative and procedural sections.*"

The D. C. majority opinion mentions the decision of this Court in the *Attleboro* case and the Congressional intent to fill the gap of the state regulation of electric utility companies. This argument, however, demonstrates that licensees were not intended to be included within the category of public utilities under Part II, since there was no gap of regulation with respect to licensees. Section 20 as reenacted in Part I provides for regulation of the interstate power sales of licensees either jointly by the states involved or, in case of their inability to agree, by the FPC. Thus there was no gap for Congress to fill in 1935 as regards licensees. The gap that Congress filled was with respect to public utilities which are not licensees whose interstate wholesale rates were held under the *Attleboro* case not to be subject to regulation by their home state. As Mr. Dozier DeVane, Solicitor for the FPC, told the House Committee (pp. 497-498):

> "I would like to say first that insofar as rates are concerned that section 201 is intended to give the Federal Power Commission jurisdiction over the wholesale rates only; rates over which the State commissions have no jurisdiction as decided by the Supreme Court of the United States in the *Public Service Commission* v. *The Attleboro Steam & Electric Co.*, 273 U. S. 83."

Mr. DeVane further stated to the Committee (p. 514):

> "We have attempted in this bill, Mr. Wolverton, to accomplish these two purposes: *One is not to supersede, but aid State regulation; and insofar as rates are concerned, to deal only with rates that State Commissions cannot regulate.*"

By all tests of reasonable construction Part II of the Act is not applicable to licensees under Part I.

Conclusion.

It is respectfully submitted that the judgment and orders of the D. C. Circuit should be in all respects reversed and the D. C. Circuit should be directed to grant petitioners' motions to set aside the orders of the FPC.

WILKIE BUSHBY,
RANDALL J. LEBOEUF, JR.,
JAMES PIPER,
RAYMOND SPARKS,
Counsel for Petitioners.

March 10, 1952.

Appendix A

PROVISIONS OF FEDERAL STATUTES EXPRESSLY RENDERING THE FEDERAL ANTITRUST LAWS INAPPLICABLE TO SPECIFIC TRANSACTIONS SUBJECT TO REGULATION

Industry	Present Federal Regulatory Statute	Date of First Enactment of Federal Regulation	Transactions, Subject to Action of Regulatory Commissions, to which Antitrust Laws Specifically Inapplicable	Statute First Providing for Inapplicability of Antitrust Laws	Date of First Enactment of Exception from Antitrust Laws
Railroad	Interstate Commerce Act, Part I (49 U.S.C. §§1-27)	1887 (24 Stat. 379)	(a) Section 5(1), (2) and (11) of the Interstate Commerce Act, as amended (49 U.S.C. §5(1), (2), (11)): Pooling of traffic or earnings and acquisitions, consolidations and mergers.	Transportation Act (41 Stat. 480)	1920
			(b) Section 5b of the Interstate Commerce Act, as amended (49 U.S.C. §5b): Rate association agreements and similar agreements.	Reed-Bulwinkle Act (62 Stat. 472)	1948
			(c) Section 7 of the Clayton Act, as amended (15 U.S.C. §18): Stock and asset acquisitions (Section 7 of Clayton Act inapplicable).	64 Stat. 1125	1950

Industry	Present Federal Regulatory Statute	Date of First Enactment of Federal Regulation	Transactions, Subject to Action of Regulatory Commissions, to which Antitrust Laws Specifically Inapplicable	Statute First Providing for Inapplicability of Antitrust Laws	Date of First Enactment of Exception from Antitrust Laws
Motor Carrier	Interstate Commerce Act, Part II (49 U.S.C. §§301-327)	1935 (49 Stat. 543)	(a) Section 5(2), (11) and (13) of the Interstate Commerce Act, as amended (49 U.S.C. §5(2), (11) and (13)): Mergers and acquisitions.	Motor Carrier Act (49 Stat. 555)	1935
			(b) Section 5(1), (11) and (13) of the Interstate Commerce Act, as amended (49 U.S.C. §5(1), (11) and (13)): Pooling of traffic and earnings.	Transportation Act (54 Stat. 905)	1940
			(c) Section 5b of the Interstate Commerce Act, as amended (49 U.S.C. §5b): Rate association agreements and similar agreements.	Reed-Bulwinkle Act (62 Stat. 472)	1948
			(d) Section 7 of the Clayton Act, as amended (15 U.S.C. §18): Stock and asset acquisitions (Section 7 of Clayton Act inapplicable).	64 Stat. 1125	1950

Industry	Present Federal Regulatory Statute	Date of First Enactment of Federal Regulation	Transactions, Subject to Action of Regulatory Commissions, to which Antitrust Laws Specifically Inapplicable	Statute First Providing for Inapplicability of Antitrust Laws	Date of First Enactment of Exception from Antitrust Laws
Water Carrier	Interstate Commerce Act, Part III (49 U.S.C. §§901-923)	1916 (39 Stat. 728)	(a) Section 5(1), (11) and (13) of the Interstate Commerce Act, as amended (49 U.S.C. §5(1), (11) and (13)): Pooling of traffic and earnings.	Shipping Act of 1916 (39 Stat. 733)	1916
			(b) Section 5(2), (11) and (13) of the Interstate Commerce Act, as amended (49 U.S.C. §5(2), (11) and (13)): Mergers and acquisitions.	Transportation Act (54 Stat. 905)	1940
			(c) Section 5b of the Interstate Commerce Act, as amended (49 U.S.C. §5b): Rate association agreements and similar agreements.	Reed-Bulwinkle Act (62 Stat. 472)	1948
			(d) Section 7 of the Clayton Act, as amended (15 U.S.C. §18): Stock and asset acquisitions (Section 7 of Clayton Act inapplicable).	64 Stat. 1125	1950
Freight Forwarding	Interstate Commerce Act, Part IV (49 U.S.C. §§1001-1022)	1942 (56 Stat. 284)	Section 5b of the Interstate Commerce Act, as amended (49 U.S.C. §5b): Rate association agreements and similar agreements.	Reed-Bulwinkle Act (62 Stat. 472)	1948

Industry	Present Federal Regulatory Statute	Date of First Enactment of Federal Regulation
Aeronautics	Civil Aeronautics Act (49 U.S.C. §§401-705)	1938 (52 Stat. 977)
Telephone	Federal Communications Act (47 U.S.C. §§151-609)	1910 (36 Stat. 544)

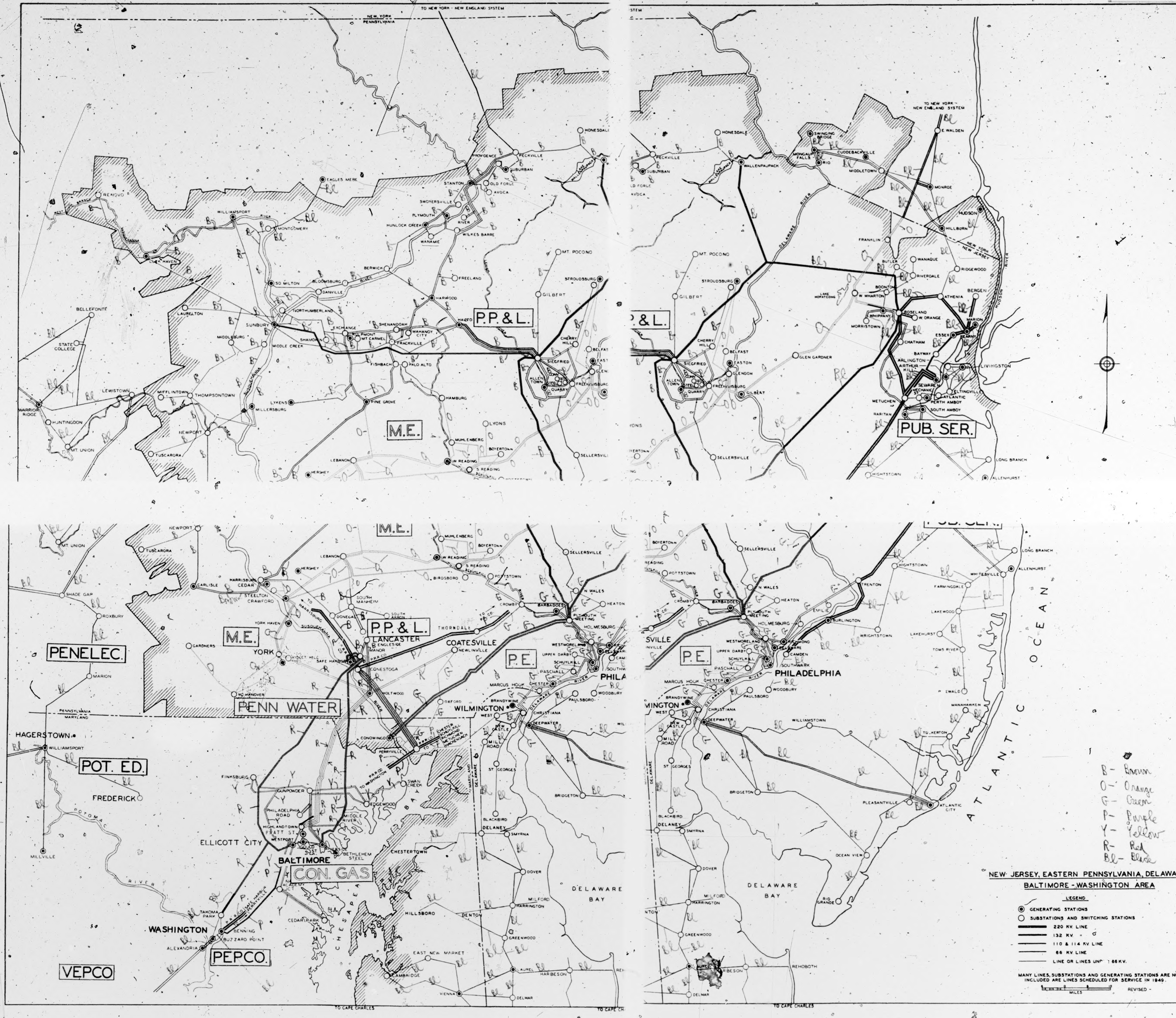
Transactions, Subject to Action of Regulatory Commissions, to which Antitrust Laws Specifically Inapplicable	Statute First Providing for Inapplicability of Antitrust Laws	Date of First Enactment of Exception from Antitrust Laws
(a) Sections 408, 409, 412 and 414 of the Civil Aeronautics Act, as amended (49 U.S.C. §§488, 489, 492 and 494): Acquisitions, mergers, consolidations, interlocking interests and pooling of earnings or traffic.	Civil Aeronautics Act (52 Stat. 1001)	1938
(b) Section 7 of the Clayton Act, as amended (15 U.S.C. §18): Stock and asset acquisitions (Section 7 of Clayton Act inapplicable).	64 Stat. 1125	1950
(a) Section 221 of the Federal Communications Act (47 U.S.C. §221): Acquisitions, mergers and consolidations.	Willis-Graham Act (42 Stat. 27)	1921
(b) Section 7 of the Clayton Act, as amended (15 U.S.C. §18): Stock and asset acquisitions (Section 7 of Clayton Act inapplicable).	64 Stat. 1125	1950

Industry	Present Federal Regulatory Statute	Date of First Enactment of Federal Regulation
Telegraph	Federal Communications Act (47 U.S.C. §§151-609)	1910 (36 Stat. 544)
Natural Gas	Natural Gas Act (15 U.S.C. §§717-717w)	1938 (52 Stat. 821)
Electric Power	Federal Power Act (16 U.S.C. §§791-825u)	1920 (41 Stat. 1063)

Transactions, Subject to Action of Regulatory Commissions, to which Antitrust Laws Specifically Inapplicable	Statute First Providing for Inapplicability of Antitrust Laws	Date of First Enactment of Exception from Antitrust Laws
(a) Section 222 of the Federal Communications Act, as amended (47 U.S.C. §222):	57 Stat. 5	1943
Acquisitions, mergers and consolidations.		
(b) Section 7 of the Clayton Act, as amended (15 U.S.C. §18):	64 Stat. 1125	1950
Stock and asset acquisitions (Section 7 of Clayton Act inapplicable).		
Section 7 of the Clayton Act, as amended (15 U.S.C. §18):	64 Stat. 1125	1950
Stock and asset acquisitions (Section 7 of Clayton Act inapplicable).		
Section 7 of the Clayton Act, as amended (15 U.S.C. §18):	64 Stat. 1125	1950
Stock and asset acquisitions (Section 7 of Clayton Act inapplicable).		

OTHER STATUTES EXPRESSLY PROVIDING FOR INAPPLICABILITY OF THE ANTITRUST LAWS IN SPECIFIC INSTANCES

Subject Matter	Statute First Providing for Inapplicability of Antitrust Laws	Date of First Enactment of Exception from Antitrust Laws
Labor, agricultural and horticultural organizations exempt from Clayton Act.	Section 6 of Clayton Act (15 U.S.C. §17)	1914 (38 Stat. 731)
Export associations, and agreements entered into by them, exempt from Sherman Act on certain conditions.	Webb-Pomerene Act (15 U.S.C. §62)	1918 (40 Stat. 517)
Certain associations of marine insurance companies exempt from the antitrust laws.	Section 29 of Merchant Marine Act (46 U.S.C. §885)	1920 (41 Stat. 1000)
Marketing agreements between the Secretary of Agriculture and producers or others engaged in the handling of agricultural commodities exempt from the antitrust laws on certain conditions.	Agricultural Marketing Agreement Act, as amended (7 U.S.C. §608b)	1937 (50 Stat. 246)
Resale price maintenance agreements exempt from Section 1 of Sherman Act, on certain conditions.	Section 1 of Sherman Act, as amended by Miller-Tydings Act (15 U.S.C. §1)	1937 (50 Stat. 693)
Non-profit institutions exempt from Robinson-Patman Act.	15 U.S.C. §13c	1938 (52 Stat. 446)
Insurance companies subject to State regulation exempt from the antitrust laws.	McCarran Act, as amended (15 U.S.C. §1012)	1945 (59 Stat. 34)


NEW JERSEY, EASTERN PENNSYLVANIA, DELAWARE, BALTIMORE - WASHINGTON AREA
LEGEND
GENERATING STATIONS
SUBSTATIONS AND SWITCHING STATIONS
220 KV LINE
132 KV
110 & 114 KV LINE
66 KV LINE
LINE OR LINES UNDER 66 KV.
MANY LINES, SUBSTATIONS AND GENERATING STATIONS ARE NOT SHOWN. INCLUDED ARE LINES SCHEDULED FOR SERVICE IN 1949.
MILES
REVISED - 10-1-48
B- Brown
O- Orange
G- Green
P- Purple
Y- Yellow
R- Red
Bl- Black
TO NEW YORK - NEW ENGLAND SYSTEM
NEW YORK
PENNSYLVANIA
NEW JERSEY
MARYLAND
P.P.&L.
PUB. SER.
M.E.
PENELEC.
PENN WATER
P.E.
POT. ED.
CON. GAS
PEPCO.
VEPCO
ATLANTIC OCEAN
DELAWARE BAY
CHESAPEAKE BAY
PHILADELPHIA
BALTIMORE
WASHINGTON
WILMINGTON
LANCASTER
YORK
COATESVILLE
HAGERSTOWN
FREDERICK
ELLICOTT CITY
TO CAPE CHARLES